Supreme Court, U.S.
FILED

011608 APR 30 2002

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No. ____

In the Supreme Court of the United States

HOULIHAN, LOKEY, HOWARD & ZUKIN, INC.
Petitioner,

v.

THE CIRCLE K CORPORATION, DEBTOR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must an estate professional's application for retention in a bankruptcy proceeding specifically reference 11 U.S.C. § 328(a) (allowing set monthly fees) in order for the retention to be under that provision, rather than 11 U.S.C. § 330 (requiring an hourly rate compensation based on time records), regardless of the parties' intent that the professional be retained on a flat monthly fee basis, and even though the retention agreement, approving order and subsequent orders relating to the professional's compensation do not require maintaining or submitting time records?

2. May a new, bright line test regarding the nature of an investment banker's engagement, judicially articulated for the first time eleven years after the investment banker commenced work and eight years after the work was completed, be applied retroactively to reduce the investment banker's compensation?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Houlihan, Lokey, Howard & Zukin, Inc., a California corporation ("Houlihan Lokey"). Respondent is The Circle K Corporation ("Circle K"), the debtor in its bankruptcy proceeding.

Houlihan Lokey is not a publicly traded company. There are no publicly held companies that own 10% or more of petitioner's stock. Petitioner has the following affiliates and subsidiaries:

- Houlihan, Lokey Howard & Zukin Financial Advisors, Inc., a California corporation.
- Sunrise Capital Partners, LP, a Delaware limited partnership.
- Century Park Capital Partners, LP, a Delaware limited partnership.

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C	*Order*, United States District Court for the District of Arizona (February 8, 2000)
D	*Order*, United States Court of Appeals for the Ninth Circuit (July 30, 1998)
E	*Order*, United States District Court for the District of Arizona (April 10, 1998)
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G	*Application For Authority To Retain Houlihan, Lokey, Howard & Zukin Capital As Financial Advisor To The Official Debentureholders Committee*, Submitted to the United States Bankruptcy Court for the District of Arizona (July 24, 1990)

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- 11 U.S.C. § 330 (2001)

K *Pertinent Legislative History*

• ***Legislative History to Section 328***

H.R. REP. NO. 95-595 at 328-29 (1977); S. REP. NO. 95-989 at 39 (1978); 124 CONG. REC. H11,091 (Sept. 28, 1978); S17,408 (Oct. 6, 1978); *reprinted in* 2002 COLLIER PAMPHLET EDITION, BANKRUPTCY CODE 165-66 (Lawrence P. King and the Honorable Mary Davies Scott eds., 2001).

• ***Legislative History to Section 330***

H.R. REP. NO. 95-595 at 329-30 (1977); S. REP. NO. 95-989 at 40-41 (1978); 124 CONG. REC. H11,091-092 (Sept. 28, 1978); S17,408 (Oct. 6, 1978); 140 CONG. REC. H10,767, H10,769 (Oct. 4, 1994); *reprinted in* 2002 COLLIER PAMPHLET EDITION, BANKRUPTCY CODE 177-81 (Lawrence P. King and the Honorable Mary Davies Scott eds., 2001).

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The December 5, 2001 opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") is reported at 272 F.3d 1150 (9th Cir. 2001), and reprinted at Pet. App. 14a-25a. The January 30, 2002 Order and Amended Opinion is reported at 279 F.3d 669 (9th Cir. 2002), and reprinted at Pet. App. 1a-13a.[1] The two orders of the United States District Court for the District of Arizona, dated April 10, 1998 and February 8, 2000, are reprinted at Pet. App. 43a-52a, and 26a-40a, respectively. The orders of the United States Bankruptcy Court for the District of Arizona (the "bankruptcy court"): (i) approving the retention of Houlihan Lokey; (ii) reserving for a later order the standards for awarding fees to investment bankers; and (iii) ultimately applying 11 U.S.C. § 330 to the compensation of petitioner, are reprinted at Pet. App. 97a-99a, 100a-108a, and 53a-72a, respectively. This last decision of the bankruptcy court is reported at 191 B.R. 426 (Bankr. D. Az. 1996).

STATEMENT OF JURISDICTION

The Ninth Circuit's decision was entered on December 5, 2001. Petitioner's timely petition for rehearing and

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[1] The January 30, 2002 amended opinion modifies the instructions on remand only. There was no change to the analysis or holding.

rehearing *en banc* was denied on January 30, 2002, and the Ninth Circuit filed its Order and Amended Opinion on that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves application of portions of the Bankruptcy Reform Act of 1978, as amended, found in Title 11 of the United States Code §§ 101, *et seq.* (the "Bankruptcy Code"). Bankruptcy Code § 1103(a) authorizes the employment of professional persons to represent or assist officially created committees in Chapter 11 proceedings. That section provides:

> (a) At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.

Bankruptcy Code § 328(a) governs the terms of retention of estate professionals, and provides:

> (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, *on any reasonable terms and conditions of employment* including on a retainer, on an hourly basis, or on a contingent

> fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. § 328(a) (emphasis added).

Finally, Bankruptcy Code § 330 governs standards for compensation for bankruptcy estate professionals, and provides in pertinent part:

> . . . subject to sections. . . 328, and 329 . . . the court may award to . . . a professional person employed under section. . . 1103 . . .
>
> > (A) reasonable compensation for actual, necessary services rendered by the . . . professional person, . . .; and (B) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a)(1). The full text of these provisions is set forth in Pet. App. 109a-114a.

STATEMENT OF THE CASE

1. Introduction.

This case presents the questions of: (1) how a professional (here, an investment banking firm) hired in a bankruptcy proceeding can have certainty regarding the nature of its retention, the basis for its compensation, and a clear direction as to what records it must keep; and (2) whether the requirements may be changed after the work has been concluded. Whether the estate professional is retained on a flat monthly fee basis (with the compensation to be changed after the services have been provided only if the terms and conditions of retention were "improvident in light of developments not capable of being anticipated at the time of" the order retaining the professional as mandated by Bankruptcy Code § 328(a)), or whether the professional must provide detailed time records and prove the reasonableness of its compensation at the end of the representation (as required by Bankruptcy Code § 330(a)(1)) is critically important to the professional being retained.

The nature of the retention and the basis for compensation, as determined at the beginning of the engagement, may dictate whether the professional is willing to be retained, the manner in which the work is done, and what records the professional keeps. While attorneys have historically been subject to the requirements of Bankruptcy Code § 330(a)(1) and have kept detailed time records and submitted itemized fee applications, investment bankers retained as financial advisors in major bankruptcies often were not required to do so, nor was (or is) keeping of detailed

time records regularly done in the investment banking industry.[2]

The issues thus relate to: (1) the conditions under which a professional in a bankruptcy proceeding (in this case an investment banking firm providing services to an official committee of creditors) is retained under a set monthly fee (sometimes referred to as "flat fee" arrangements) as contemplated in Bankruptcy Code § 328(a), and whether a retention application which does not specifically reference Bankruptcy Code § 328(a) is always a § 330(a)(1) retention (requiring submission of detailed time records and an hourly rate analysis), regardless of the parties' intent; and (2) whether a new rule, if adopted, may fairly be applied long after the work was done and when it is impossible for the estate professional to comply with the newly created and imposed requirement.

The specific nature of the retention of investment bankers is a crucial issue given the expanding number and complexity of large Chapter 11 bankruptcy proceedings in which the services of sophisticated financial advisors are vital.[3] The American Bankruptcy Institute, a nationally

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[2] *See American Bankruptcy Institute National Report On Professional Compensation In Bankruptcy Cases* (G.R. Warner, Rep. 1991) (the "ABI Report") at 73. The ABI Report recognized that, in the investment banking industry, "the customary billing practices... place far less emphasis on the number of hours devoted to the task than do the billing practices in the legal and accounting professions." *Id. See also* note 6, *infra*, for a more detailed discussion of the ABI Report.

[3] The number and amounts at issue in Chapter 11 restructurings, all requiring sophisticated financial advisory

recognized, non-partisan, non-profit association of insolvency judges, administrators, academicians and professionals, noted the nationwide lack of uniformity in treatment of compensation of investment bankers in bankruptcy proceedings in its landmark 1991 study on professional compensation in bankruptcy cases:

> Investment bankers fill a unique role in the bankruptcy process, serving mostly in the largest and most complex cases. To the extent that investment bankers become involved in a wider range of cases, the tension created by the difference between treatment they receive and the treatment accorded to other types of professionals can be expected to increase.[4]

In September 1990 the bankruptcy court below approved the retention of Houlihan Lokey as the financial advisor to the Official Debenture Holders Committee (the "Committee") in the Circle K Chapter 11 bankruptcy proceeding. Pet. App. 97a-99a (the "Retention Order"). The creditors represented by the Committee held approximately $425 million of subordinated public debt of Circle K. Pet. App. 27a. The application of the Committee to retain Houlihan Lokey stated that the services of a financial advisor were necessary to help the Committee evaluate "the complex financial and economic issues" in this reorganization

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services, is extraordinary. A record 257 public companies with $258 billion in assets sought Chapter 11 protection in 2001, and those figures represent an increase from 2000 wherein 176 public companies with $95 billion in assets filed Chapter 11 proceedings. *See Last Chapter*, The Wall Street Journal, Feb. 27, 2002, p. 1.

[4] See ABI Report at 76. *See also* note 6, *infra*.

proceeding, and sought approval for Houlihan Lokey to receive $100,000 per month, plus expenses. Pet. App. 75a and 77a. As acknowledged by the bankruptcy court, the intent of the parties in the engagement approved by it called for a "flat fee arrangement" whereby Houlihan Lokey would be paid a monthly fee of $100,000 plus expenses.[5] The Retention Order did not require the submission of time records and provided no specific notice that the bankruptcy court would later apply Bankruptcy Code § 330 standards requiring submission of detailed time records. Pet. App. 97a-99a.

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[5] The bankruptcy court expressly recognized that the parties intended to have a "flat fee arrangement" (*i.e.*, payment of a set amount per month) at the time of Houlihan Lokey's retention.

> In the Salomon dispute [involving a dispute regarding Salomon Brothers' fee application], the engagement letter and [retention] application were filed by stipulation between the committees and debtor, outlining rules for retention of financial advisors. It was at least implied that the financial advisor would receive monthly fees. ***It appeared the parties contemplated a flat fee arrangement for Salomon.*** 165 Bankr. at 656.
>
> ***In this case***, while the [Houlihan Lokey] employment application was filed before the stipulation, ***the parties also appear to have contemplated a flat fee arrangement.***

Pet. App. 67a-68a (emphasis added).

In December 1991, the bankruptcy court entered a subsequent order setting forth requirements for detailed time records (and reasonableness review parameters of fee applications) by most professionals. Pet. App. 100a-108a (the "December 1991 Order"). The bankruptcy court explicitly exempted and excluded investment bankers from that order. Pet. App. 103a. The bankruptcy court stated that it would issue a "separate order" to govern compensation guidelines for investment bankers. *Id.* The bankruptcy court acknowledged it never issued the "separate order." Pet. App. 58a.

The Circle K Chapter 11 proceeding lasted from May 1990 to April 1993, when a plan of reorganization was confirmed. In October 1993 Houlihan Lokey submitted its final fee application, requesting final approval of $3,300,000 in fees ($100,000 per month for thirty-three months) and $207,699.35 in expenses. Pet. App. 60a. Circle K objected, and the bankruptcy court applied Bankruptcy Code § 330 in concluding that Houlihan Lokey was entitled to only one-half of the compensation and expenses. Pet. App. 70a-71a. The bankruptcy court found that Bankruptcy Code § 330(a)(1) required submission of "meticulously accurate time records of all services rendered . . . as a necessary prerequisite to fee recovery." Pet. App. 71a. In doing so, the bankruptcy court rejected Houlihan Lokey's argument that its retention was based on Bankruptcy Code § 328(a), so that the flat fee retention approved in 1990 could only be modified if it proved "to be improvident in light of developments not capable of being anticipated" in 1990. Pet. App. 65a.

In 1990 retention of investment bankers under flat monthly fee agreements was a standard practice in approximately 38% of the bankruptcy courts in the United

States,[6] and there was no controlling case law requiring

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[6] Coincidentally, at the time of Houlihan Lokey's retention in mid-1990 the bankruptcy bench and bar began to examine the retention and compensation of investment bankers in reorganization cases. Most instructive in evaluating the amorphous state of the law and practice at the time Houlihan Lokey was retained is the ABI Report, prepared by the American Bankruptcy Institute during 1989, 1990, and 1991 and published in May 1991. The ABI Report is the seminal (and indeed only) substantive empirical analysis on this and other issues regarding many aspects of professional compensation in bankruptcy cases.

The ABI Report highlighted the lack of uniformity among the country's bankruptcy judges, and concluded:

> • About 25% of the bankruptcy judges who have dealt with investment bankers did not frequently impose the same fee application requirements on them as on other professionals (ABI Report at 73-75);
> • About 19% of the bankruptcy judges who had dealt with investment bankers never imposed record keeping requirements on investment bankers (*id.* at 75);
> • About 38% of the bankruptcy judges who had dealt with investment bankers "reject(ed) the hourly basis approach" to investment banker compensation (*id.*).

The ABI Report was compiled by the ABI's Committee on Professional Compensation. ABI Report, viii. The Committee's Chair, at the invitation of Senator Metzenbaum, testified before the Senate Judiciary Committee Oversight Hearing on Professional Fees in Bankruptcy Cases, held on March 24, 1992, regarding the findings and conclusions of the ABI Report. The ABI Report was the product of nearly three years of intensive and extensive research

maintenance of detailed time records. Indeed, the other two investment banking firms in the Circle K bankruptcy proceeding, Salomon Brothers and Merrill Lynch, were also retained on flat monthly fee arrangements, with no obligation to maintain detailed time records. Pet. App. 12a and 67a.

Notwithstanding the practice in the investment banking industry in 1990 not to maintain or bill based on detailed time records, the Ninth Circuit in the case *sub judice* adopted a

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and analysis of hundreds of issues relating to retention and compensation of professionals and others in bankruptcy cases by lawyers, accountants, and other professionals from Alabama, Arizona, Arkansas, California, Connecticut, Idaho, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, South Dakota, Tennessee, Texas, Washington, and Washington, D.C. ABI Report, 5-12. In addition, the Hon. George C. Paine, II (Chief Judge, Middle District of Tennessee), the Hon. Leif M. Clark (San Antonio) and the Hon. Polly S. Higdon (Eugene, Oregon) provided input and insight from the judicial perspective, and input from the U.S. Trustee's Office was provided by Scott Michel (U.S. Trustee, Chicago), Virginia Greiman (U.S. Trustee, Boston), and Sandra Rasnak (U.S. Trustee, Chicago). ABI Report, iii-iv; viii-ix.

After the most pressing issues were identified through in depth working papers (which analyzed both published and unpublished judicial decisions to determine areas of controversy), the Northwestern University Survey Laboratory was commissioned to complete survey questions to be sent to 651 respondents, including over 100 of the sitting Bankruptcy Judges in the United States, as well as a nationwide sampling of lawyers, accountants, trustees and others involved in the bankruptcy process. ABI Report, 6-12. The ABI Report was disseminated to members of Congress and numerous bankruptcy judges in the United States in the summer of 1991.

new, previously unknown "bright line" test that required, as a matter of law, that before an estate professional could receive the benefit of a "flat fee" compensation arrangement, the initial retention application must specifically designate the retention as one under Bankruptcy Code § 328(a):

> We hold that unless a professional's retention application unambiguously specifies that it seeks approval under § 328, it is subject to review under § 330.

Pet. App. 7a and 19a.

In doing so, the Ninth Circuit explicitly rejected the holding and analysis of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in *Donaldson Lufkin & Jenrette Securities Corp. v. National Gypsum Co. (In re National Gypsum Co.)*, 123 F.3d 861 (5th Cir. 1997). The Fifth Circuit there held that an investment banker was employed under Bankruptcy Code § 328 even though the retention application did not specify § 328 and the bankruptcy court's approval order retained to the court the right to approve the reasonableness and the amount of the fees. The Ninth Circuit opinion below is directly contrary to the Fifth Circuit's holding in *National Gypsum*.[7] This Court should

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[7] The Ninth Circuit acknowledged it was directly splitting from the Fifth Circuit:

> We respectfully disagree with the Fifth Circuit's decision in *Donaldson Lufkin & Jenrette Sec. Corp. v. Nat'l Gypsum Co. (In re Nat'l Gypsum Co.)*, 123 F.3d 861 (5th Cir. 1997).

Pet. App. at 12a and 24a.

accept review in order to resolve the division between the Circuits and decide this disputed question of federal law.

The case below is the first articulation, to petitioner's knowledge, of this new bright line test. If a new bright line test is to be adopted, retrospective application is particularly inappropriate. A new test should not be applied in 2001 to a retention in 1990 for which all services were rendered by 1993. Loss of its compensation, repayment of $1.3 million in fees previously paid from 1990 to 1993, and forfeiture of holdback amounts of approximately $400,000, is unfair to petitioner under these circumstances. Similarly, applying this new standard retrospectively to other professionals who likewise have no opportunity to comply after the fact is unfair.

2. Course of Proceedings and Dispositions Below.

Houlihan Lokey was retained from 1990 to 1993 as financial advisor to the Committee pursuant to a retention application dated July 25, 1990 (the "Retention Application"). Pet. App. 73a-96a. The retainer letter attached to, and incorporated in, the Retention Application called for monthly payments of $100,000 plus expenses, and the Retention Application stated that the letter fixed the terms and conditions of the engagement. Pet. App. 84a-86a. On September 19, 1990 the bankruptcy court approved the retention "subject to review by the court in a final fee application . . .." Pet. App. 99a. The Retention Order was silent as to any reasonableness review based on submission of time records, did not mention either § 328 or § 330, and did not provide any notice that the bankruptcy court would later apply the reasonableness standards set forth in Bankruptcy Code § 330. Pet. App. 97a-99a.

In December 1991 the Bankruptcy Court entered the December 1991 Order governing the payment and fee procedures for most professionals. Pet. App. 100a-108a. That order explicitly excluded investment bankers from the detailed timekeeping procedure, saying that they would be dealt with in a separate order. Pet. App. 103a. No separate order, however, was ever entered. Pet. App. 58a.

Houlihan Lokey filed its final fee application in October 1993 (the "Fee Application"). Pet. App. 58a. Circle K objected (Pet. App. 54a), and by its order dated January 17, 1996 the bankruptcy court ultimately determined that Houlihan Lokey was not a professional with a "flat fee" arrangement under Bankruptcy Code § 328(a), and as such had a duty to present "meticulously accurate time records of all services rendered to the estate as a necessary prerequisite" to recovery of fees. Pet. App. 71a. The bankruptcy court determined that, with respect to Houlihan Lokey's retention, while the "parties . . . appear to have contemplated a flat fee arrangement" when the Retention Application was filed in September 1990,[8] only one-half of the requested fees and costs would be approved because the absence of "meticulous" time records failed to satisfy Bankruptcy Code § 330(a). *Id.*

On Houlihan Lokey's appeal, the district court on April 10, 1998 reversed and remanded, finding that the Houlihan Lokey retention was, by its terms, under Bankruptcy Code § 328(a). Pet. App. 51a.[9]

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[8] *See* note 5, *supra*.

[9] Circle K's appeal of that district court order to the Ninth Circuit was dismissed for lack of jurisdiction. Pet. App. 41a-42a.

On remand, the bankruptcy court on January 27, 1999 awarded Houlihan Lokey the full amount of its requested fees and costs. Pet. App. 48. Circle K appealed to the district court, which on February 8, 2000 affirmed. Pet. App. 26a-40a.

The Ninth Circuit reversed, applying a new bright line test retroactively, and held that the initial bankruptcy court approval of the Retention Application was "conditional" and was to be governed solely by Bankruptcy Code § 330. Pet. App. 13a and 25a. Houlihan Lokey sought rehearing *en banc*, which the Ninth Circuit denied on January 30, 2002. The Ninth Circuit amended its December 5, 2001 decision to allow the bankruptcy court to conduct a Bankruptcy Code § 330 assessment and award such fees and expenses as it finds to be appropriate pursuant to that statute. Pet. App. 5a.

REASONS FOR GRANTING THE PETITION

This case squarely presents two important issues. First, is the retention of an estate professional in a bankruptcy proceeding always to be treated as a Bankruptcy Code § 330 retention unless the retention application explicitly states that the retention is under § 328(a), or must the court determine the parties' intent at the time of the retention? Second, if a new "bright line" test is to be adopted to control this federal law issue, should such new test be retroactively applied to an investment banker's retention (and work performed thereunder) a decade earlier?

1. Review Is Necessary In Order To Resolve The Split Among The Circuits On An Important Issue Of Federal Law.

On the first issue, the Ninth Circuit and the Fifth Circuit have come to directly inconsistent conclusions on this issue. Houlihan Lokey submits that the Fifth Circuit's holding and reasoning represent the better view, which is consistent with the public policy behind the Bankruptcy Code. This important issue should be decided on the basis of substance and not form. No "magic words" or mechanical test should be imposed. In *National Gypsum* the Fifth Circuit, on very similar facts, found that the retention of an investment banking firm, Donaldson Lufkin & Jenrette ("DLJ"), in 1991 was a § 328 retention, even though neither the retention application nor the approving order specifically mentioned § 328. The order approving the retention of DLJ specifically stated that the court "retains the right to consider and approve the reasonableness and amount of DLJ's fees on both an interim and final basis." *National Gypsum*, 123 F.3d at 862.

As here, the bankruptcy court approved payment to DLJ of a monthly amount. Based on the record, the Fifth Circuit found the retention to be under Bankruptcy Code § 328 and not § 330. The Fifth Circuit was guided by the strong bankruptcy policy considerations favoring retention of professionals under § 328:

> If prior approval is given to a certain compensation, § 328 controls and the court starts with that approved compensation, modifying it only for developments unforeseen when originally approved. ***If the most competent professionals are to be available for complicated capital restructuring and the***

> ***development of successful corporate reorganization, they must know what they will receive for their expertise and commitment. Courts must protect those agreements and expectations, once found to be acceptable.***

National Gypsum, 123 F.3d at 862-63 (emphasis added). The Fifth Circuit relied on the important public policy surrounding the retention of professionals embodied in the Bankruptcy Code:

> Prior to 1978 the most able professionals were often unwilling to work for bankruptcy estates where their compensation would be subject to the uncertainties of what a judge thought the work was worth after it had been done. That uncertainty continues under the present § 330 of the Bankruptcy Code, which provides that the court award to professional consultants "reasonable compensation" based on relevant factors of time and comparable costs, etc. Under present § 328, the professional may avoid that uncertainty by obtaining court approval of compensation agreed to with the trustee (or debtor or committee).

National Gypsum, 123 F.3d at 862. *See also* Pet. App. 36a-37a; *Peele v. Cunningham (In re Texas Secs., Inc.)*, 218 F.3d 443, 445 (5th Cir. 2000) (the Fifth Circuit held that the retention of special litigation counsel was governed by § 328, even though the initial retention did not specify § 328).

While the Ninth Circuit recognized the Fifth Circuit's contrary view, it expressly declined to follow the reasoning

there.[10] In a number of cases (including one in the Ninth Circuit and one in the Ninth Circuit Bankruptcy Appellate Panel), courts have found retentions to be governed by Bankruptcy Code § 328 even though § 328 was not explicitly referenced at the time of the retention. *See Reimers v. Pitrat (In re Reimers)*, 972 F.2d 1127, 1129 (9th Cir. 1992); *In re Confections by Sandra, Inc.*, 83 B.R. 729, 733 (B.A.P. 9th Cir. 1987). *Accord, In re Malcon Developers, Inc.*, 138 B.R. 677, 680-82 (Bankr. N.D.N.Y. 1992); *United States v. Ruff*, 179 B.R. 967, 972 (Bankr. M.D. Fla. 1995); *In re Omegas Group, Inc.*, 195 B.R. 875, 878, 880 (Bankr. W.D. Ky. 1996).

Other courts have found that the language of the approval order, and the terms and conditions of the retention, control the nature of the engagement. *See Zolfo, Cooper &*

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[10] *See* note 7, *supra*. The Ninth Circuit, in establishing its new standard, also declined to follow the approach it had taken just a year earlier. In *In re B.U.M. International, Inc.*, 229 F.3d 824, 825, 831 (9th Cir. 2000), the bankruptcy court approved a fee application containing both a fixed monthly fee (similar to that approved here) and a contingent fee. There, as here, neither the application nor the approval order specifically referenced § 328. Unlike the bright line test adopted here, the Ninth Circuit in *B.U.M. International* conducted an analysis of the circumstances to determine what the parties intended at the time of the retention. Since the bankruptcy court in *B.U.M. International* had expressly stated its view, at the time of the retention, that it could "review this engagement at the end of the process to determine the fees paid were reasonable and of some benefit to the estate, and that said professional may be required to disgorge any unreasonable amounts," 229 F.3d at 826, the clear contextual evidence from the time of the initial retention showed a pre-retention intent for a § 330 retention.

Co. v. Sunbeam – Oster Co., 50 F.3d 253, 263 (3d Cir. 1995); *Crane v. Arthur Winer, Inc. (In re Taxman Clothing Co.)*, 134 B.R. 286, 289 (N.D. Ill. 1991). These cases do not require that § 328 be referenced in the initial application, but rather focus on the substantive terms of the retention as set forth in the initial retention agreement and approval order.

There is now a clear conflict between the Ninth Circuit and the Fifth Circuit on this important issue of federal law and bankruptcy policy. Judging by the number of reported decisions on this issue, this area of controversy occurs frequently in bankruptcy cases and will likely continue to be a disputed issue (absent a decision from this Court) in cases in the future. Review by this Court is necessary in order to eliminate confusion and conflicting results and ensure consistent application of federal law.

2. The New Test Should Not Be Applied Retroactively.

Even if a new bright line standard is to control future engagements of professionals in bankruptcy proceedings, it should not be applied to a retention commenced eleven years prior to the adoption of the new rule. Such a bright line test was not the law in the Ninth Circuit (or indeed, in any circuit) in 1990 when Houlihan Lokey began performing services in reliance upon its flat monthly fee retention, nor was it the law in 1993 when Houlihan Lokey completed its work. It is fundamentally unfair to determine in 2001 that Houlihan Lokey is to be deprived of one-half of its fees and costs (return of approximately $1.3 million, and forfeiture of a holdback amount of approximately $400,000) because it did not cite the specific statutory section in its Retention Application in 1990, when there was no statute, controlling case law, or order of the court which required the use of such

"magic words" in the application, nor was there a uniform practice in the bankruptcy courts across the country.

Whether a civil decision based on federal law is to be given retroactive effect is governed by the principles established in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107-108 (1971).[11] *See also American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 178 (1990); *Griffith v. Kentucky*, 479 U.S. 314, 327-328 (1987); *United States v. Johnson*, 457 U.S. 537, 550 n. 12 (1982). In *Chevron*, this Court set forth the applicable analysis regarding whether a decision should be given retroactive effect:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, ... or by deciding an issue of first impression whose resolution was not clearly foreshadowed.... Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective

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[11] Whether a constitutional decision of the Supreme Court is to be applied retroactively is a matter of federal law. *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 177-78 (1990); *Chapman v. California*, 386 U.S. 18, 21 (1967). State law governs the prospective or retroactive effect of state court decisions. *See Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932).

> operation will further or retard its operation." ... Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."

404 U.S. at 106-07 (citations omitted).

In *Chevron*, this Court held that a shorter statute of limitations under state law would not be applied retroactively in a federal case. *Id.* at 100. While the action was pending in the lower court, but after the one-year state statute of limitations had run, the Court in another case[12] held that state law, rather than the 2-year limitation period under federal law, governed an action for personal injuries suffered by an off-shore oil rig worker. *Chevron*, 404 U.S. at 100. The Court found that all three of the controlling factors supported non-retroactivity. *Id.* at 107. The *Rodrigue* decision was a case of first impression whose result was not foreshadowed. A purpose of the underlying statute was to provide remedies for injured workers. *Rodrigue*, 395 U.S. at 355. "To hold that the respondent's lawsuit is retroactively time barred would be anomalous indeed." *Chevron*, 404 U.S. at 107. Retroactivity "would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." *Id.* at 108. This would produce a substantial inequitable result. *Id.* at 108-09.

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[12] *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969).

The facts here closely parallel those in *Chevron*. The Ninth Circuit's bright line test is a new legal principle which could not have been foreseen eleven years earlier, at the time of the retention. Application of the new standard to Houlihan Lokey effectively deprives petitioner of any effective remedy because the 1990 Retention Application cannot be revised at this point. A purpose of the statute—to encourage professionals to provide needed services in complex bankruptcies—is undermined by retroactive application which changes the terms of engagement after the work is completed. There is a substantially inequitable result here because the intent of the parties is defeated and petitioner is deprived of the benefit of its retention after all services have been provided.

The *Chevron* standards have been applied in numerous cases to reject retroactivity of a new rule of law. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982), for example, this Court applied a new interpretation prospectively only in a leading bankruptcy case. There, a non-debtor defendant in a breach of contract lawsuit initiated by a debtor under the Bankruptcy Reform Act of 1978 challenged the constitutionality of bankruptcy court jurisdiction under the then-existing bankruptcy jurisdictional statute. Finding the grant of jurisdiction under 28 U.S.C. § 1471(c) to be unconstitutional, this Court undertook an analysis under *Chevron* to determine if the ruling should be effective retrospectively, and concluded that all of the *Chevron* factors were met because the broad grant of jurisdiction to non-Article III judges involved an unprecedented interpretation of Article III, retrospective application would not further the operation of the Court's decision, and substantial injustice and hardship would be imposed on those litigants that relied on the bankruptcy courts' jurisdiction under the existing law. The

Court thus concluded that its decision would apply prospectively only. *Northern Pipeline*, 458 U.S. at 87.

Circuit court decisions rejecting retroactive application of a new legal principle have likewise focused on whether the new principle was foreshadowed, whether the purposes of the underlying law would be served by retrospective application, and whether such application would produce an inequitable result. *See, e.g., George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997) (prior decision granting parties in the Northern Mariana Islands additional time to appeal unfavorable decisions to be applied prospectively only); *Luckett v. Jett*, 966 F.2d 209, 211 (7th Cir. 1992) (decision that the procedures for processing discrimination claims under the Illinois Human Rights Act violated the due process clause of the fourteenth amendment would not apply retroactively); *Rice v. Rice*, 951 F.2d 942, 943 (8th Cir. 1991) (holding that federal statute prohibiting the wiretapping of telephone conversations in the marital home would not be applied retroactively, based on the inequity of such a result); *In re Bendectin Litigation*, 857 F.2d 290, 293 (6th Cir. 1988) (holding that due process mandated that a plaintiff not be excluded from the proceedings absent disruptive behavior or a knowing waiver, and that a plaintiff with a physical abnormality cannot be excluded from trial even when the abnormality is allegedly due to the defendant's conduct, would not apply retrospectively because a lengthy trial had been concluded, a verdict had been rendered, and the subsequent decision involved an issue of first impression in the circuit); *International Assoc. of Machinists and Aerospace Workers, AFL-CIO v. Aloha Airlines, Inc.*, 790 F.2d 727, 729

(9th Cir. 1986) (extension of the rationale of *DelCostello*[13] to "hybrid" claims arising under the Railway Labor Act would not apply retrospectively, as the extension was a new ruling that could not be foreseen by the litigants, and thus it would be inequitable to subject the union to the new rule; the second *Chevron* factor weighed in favor of retrospective application, but the first and third factors outweighed this consideration); *United States v. LePatourel*, 593 F.2d 827, 828 (8th Cir. 1979) (holding requiring filing of timely administrative claim under the Federal Tort Claims Act against federal judge performing official, but non-judicial, acts would not be applied retroactively; the prior ruling was a case of first impression in the circuit that could not have been anticipated by the plaintiffs; granting the ruling prospective relief only would further the purposes of the statute by allowing the plaintiffs to file a claim against the judge; and it would be inequitable not to allow the plaintiffs to prosecute their claims against the judge).[14]

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[13] *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983).

[14] Retrospective operation has been appropriate where there was no new rule of law, or the decision was clearly foreseeable, where the purposes of the rule called for retroactive application, or where the equities favored such result. *See, e.g., Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 918-20 (1990) (decision invalidating state gross receipts tax was not revolutionary and did not satisfy first prong of *Chevron*); *Hallstrom v. Tillamook County*, 493 U.S. 20, 32 (1989) (no new rule of law); *United States v. Dickstein*, 971 F.2d 446, 452 (10th Cir. 1992) (ruling was a logical extension of prior law and no hardship); *United States v. Spokane*, 918 F.2d 84, 89 (9th Cir. 1990) (no new rule of law or issue of first impression); *Casiano v. Heckler*, 746 F.2d 1144, 1146 (6th Cir. 1984) (decision was presaged and no unfairness); *Travis v. Trust Co. Bank*, 621 F.2d 148, 150-51 (5th Cir. 1980) (rule should have

Chevron requires that the Ninth Circuit's new bright line test in the case *sub judice* not be applied retroactively. With regard to the first element, the Ninth Circuit clearly articulated a new legal standard not previously announced or applied. There was no requirement in federal bankruptcy law that the retention application of a professional specifically reference Bankruptcy Code § 328 in order for the review standard of § 328 to govern the engagement. Rather, under the prior practice, the intent controlled, as determined from the language and the context. The new bright line requirement for "magic words" conflicts with the Fifth Circuit decision in *National Gypsum*. As recently as October 2000, the Ninth Circuit in *B.U.M. International* looked to the underlying facts to determine the parties' intent and did not articulate or apply a bright line test.[15]

As to the second element, retrospective application here will not advance the purposes or the underlying reason of the new holding. The statute's purpose is clearly to allow the engagement of experienced professionals, and to encourage such professionals to provide their services in bankruptcy proceedings. Retrospective application, effectively changing the rules after the work is completed and forcing professionals to work under terms different from those intended and different from those which are customary outside of bankruptcy, will only discourage professionals from providing services in the very complex bankruptcy proceedings in which those services are particularly

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been anticipated, and statutory purpose served by retrospective application).

[15] *See* note 10, *supra*.

necessary. The apparent reason for a bright line test is to eliminate future factual disputes and ease the burden on the bankruptcy courts and reviewing courts in determining the nature of the representation. That purpose is appropriately served by announcing the new rule and providing notice to those entering into such service arrangements in the future. Applying it retrospectively to petitioner's retention in 1990 does nothing to advance that purpose, and serves only to punish Houlihan Lokey, not for failing to provide valuable services to Circle K and its creditors,[16] but for not having the foresight to know that the law would be changed more than a decade later.

Finally, application of this new test to the present case would be fundamentally unfair and directly contrary to the parties' intentions. Petitioner followed the law as it existed in 1990, when there was no requirement for specifying the section of the statute under which retention was sought. The bankruptcy court specifically found that the parties intended here to enter into a flat fee arrangement.[17] Houlihan Lokey

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[16] Indeed, the bankruptcy court acknowledged that Houlihan Lokey's services benefited the bankruptcy estate:

> The Court is personally familiar with the services provided by [Houlihan Lokey] and has no difficulty in concluding such services benefited in some measure these jointly administered estates.

Pet. App. 54a.

[17] There is no dispute about the parties' original intent about petitioner's retention—it was expressly recognized by the bankruptcy court that the parties "appear to have contemplated a flat fee arrangement." *See* note 5, *supra*.

relied upon that arrangement, and the bankruptcy court's approval of it in 1990, and rendered services for nearly three years. Now, eleven years after it was retained and eight years after the services have been completed, it is fundamentally unfair to impose such new standards, which cannot be met after the fact, and to deprive petitioner of one-half the value of the services it provided (amounting to approximately $1.7 million). *See, e.g., Chevron*, 404 U.S. at 107-08 (finding that it would be inequitable to apply a new principle of law retroactively when party relied upon law as it was before new principle announced); *George*, 119 F.3d at 1401 (applying *Chevron* factors and finding such factors "uniformly weigh heavily in favor of prospective application").

As all three elements of the *Chevron* test have been satisfied here, the Court should not apply this new rule to the present case.

CONCLUSION

Houlihan Lokey respectfully submits that the petition for a writ of certiorari should be granted and the conflict between the decisions of the Ninth Circuit and the Fifth Circuit resolved. At minimum, the Court should accept review and direct that the new test not be applied retroactively to petitioner here.

RESPECTFULLY SUBMITTED,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-15361

[Filed January 30, 2002]

In re: THE CIRCLE K CORPORATION, Debtor.	)
THE CIRCLE K CORPORATION, Appellant,	)
v.	)
HOULIHAN, LOKEY, HOWARD & ZUKIN, INC., Appellee.	)

ORDER AND AMENDED OPINION

On Appeal from
United States District Court
for the District of Arizona
No. CV-99-00-492-RGS
Judge Roger G. Strand

JUDGES:
Before: Henry A. Politz,* William A. Fletcher and Raymond C. Fisher, Circuit Judges.

SUMMARY

Bankruptcy/Litigation and Procedure (Civil)

The court of appeals reversed a judgment of the district court. The court held that unless the retention application of a professional employed in the course of a Chapter 11 bankruptcy proceeding unambiguously specifies that it seeks approval under 11 U.S.C. § 328, it is subject to review under 11 U.S.C. § 330.

Section 328(a) of the Bankruptcy Code permits a professional employed in the course of a Chapter 11 bankruptcy proceeding to have the terms and conditions of its employment pre-approved by the bankruptcy court, such that the bankruptcy court may alter the agreed-upon compensation only if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions. In the absence of preapproval under § 328, fees are reviewed at the conclusion of the bankruptcy proceeding under a reasonableness standard pursuant to § 330(a)(1).

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* The Honorable Henry A. Politz, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

Appellant The Circle K Corporation filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Thereafter, the Official Debentures Committee (Committee) sought approval from the bankruptcy court to retain appellee Houlihan, Lokey, Howard and Zukin (HLHZ) as its financial advisor. In the Retention Application, the Committee requested authority to enter into an agreement establishing the terms and conditions of HLHZ's engagement, as outlined in the attached Retainer Agreement, which specified that HLHZ would be paid a fee of $100,000 per month plus reasonable out-of-pocket expenses. The Retainer Agreement acknowledged that it was subject to the approval of the Court, which the Committee would promptly use its best efforts to obtain. The Retention Application also stated that HLHZ would be paid $100,000 per month and that all fees paid would remain subject to subsequent bankruptcy court approval in a final fee application to be submitted to the Court. Neither the Retention Application nor the Retainer Agreement explicitly mentioned § 328.

The bankruptcy court subsequently authorized the Committee and the Unsecured Creditors Committee to retain HLHZ. The court order provided that the debtors were authorized to pay HLHZ the amount of $100,000 per month and reimburse expenses as set forth in the Application and Retainer Agreement subject to review by the court in a final fee application to be submitted by HLHZ on notice pursuant to relevant provisions of the Bankruptcy Code. The Retention Order did not mention § 328 or § 330.

When HLHZ submitted a First Amended Final Fee Application, the bankruptcy court assessed the reasonableness of HLHZ's fees and expenses under § 330 and entered orders

granting one-half of Houlihan Lokey's requested fees and costs and denying the other half. HLHZ appealed, and the district court determined that HLHZ had been employed pursuant to § 328, reversed the bankruptcy court's ruling and remanded the case to award HLHZ the fees requested unless the bankruptcy court would find that the terms and conditions of its fee agreement were improvident under the standard of review prescribed in § 328. The bankruptcy court subsequently entered an order granting HLHZ the full amount of fees and costs requested, as well as interest and attorney's fees. Circle K appealed to the district court, which denied its appeal and affirmed the bankruptcy court.

Circle K appealed.

[1] Because the retention application did not unambiguously specify that § 328 governed, § 330 review was appropriate. [2] Even though the Committee sought prior approval from the bankruptcy court to enter into a flat monthly fee arrangement with HLHZ, the Retention Application did not specifically refer to § 328, and it provided that all fees so paid would remain subject to subsequent bankruptcy court approval in a final fee application to be submitted to the court. The Retention Order also made no reference to either § 328 or § 330. Finally, the bankruptcy court authorized the Committee to pay HLHZ $100,000 per month, subject to review by the court in a final fee application to be submitted by HLHZ. Thus, the bankruptcy court only conditionally approved HLHZ's retention and § 328 did not apply.

[3] Unless a professional is unambiguously employed pursuant to § 328, its professional fees will be reviewed for

reasonableness under § 330. To ensure that § 328 governs the review of a professional's fees, a professional must invoke the section explicitly in the retention application.

COUNSEL

Christopher H. Bayley and Lori A. Schmig, Snell & Wilmer L.L.P., Phoenix, Arizona, for the appellant.

Thomas J. Salerno, Donald A. Wall and Jordan A. Kroop, Squire, Sanders & Dempsey L.L.P., Phoenix, Arizona, for the appellee.

ORDER

The opinion filed December 5, 2001, is amended as follows:

At slip op. 16550, *delete* the last sentence of the opinion ("We reverse the district court's decision and remand the case with instructions to grant Houlihan Lokey's fees and expenses in accordance with the bankruptcy court's sec. 330 assessment.") and *replace* with --

> "We reverse the district court's decision and remand the case with instructions to remand the case to the bankruptcy court. The bankruptcy court may grant such fees and expenses as it finds appropriate under 11 U.S.C. sec. 330, subject to appropriate review by the district court."

With this amendment, the panel has voted to deny appellee's petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc, filed December 19, 2001, is DENIED.

OPINION

FISHER, Circuit Judge:

Overview

This appeal presents the question of how a professional employed in the course of a Chapter 11 bankruptcy proceeding can be assured that its fees will be reviewed under the standards of 11 U.S.C. § 328, rather than § 330. Section 328(a) permits a professional to have the terms and conditions of its employment pre-approved by the bankruptcy court, such that the bankruptcy court may alter the agreed-upon compensation only "if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions."[1] In the absence of preapproval under

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[1] "The trustee . . . with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such

§ 328, fees are reviewed at the conclusion of the bankruptcy proceeding under a reasonableness standard pursuant to 11 U.S.C. § 330(a)(1).

We hold that unless a professional's retention application unambiguously specifies that it seeks approval under § 328, it is subject to review under § 330. As a matter of good practice, the bankruptcy court's retention order should likewise specifically confirm that the retention has been approved pursuant to § 328 so as to avoid any ambiguity. The absence of such a specific reference in the bankruptcy court's order, however, would not of itself automatically override the retention application's invocation of § 328.[2]

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terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. § 328(a).

In contrast, Section 330 provides that the bankruptcy court "may award to a trustee, an examiner, a professional person employed under section 327 or 1103 -- (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Section 328 permits a professional to avoid 11 U.S.C. § 330, which specifies the procedure to compensate a professional at the conclusion of the bankruptcy proceeding.

[2] Of course, a bankruptcy court is not compelled to accept a professional's employment under § 328 merely because the application cites that statutory provision. The bankruptcy court is free to make clear that it is only conditionally approving the

Factual and Procedural Background

The Circle K Corporation filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in May 1990. In July, the Official Debentures Committee ("Bondholder Committee") sought approval from the bankruptcy court to retain Houlihan, Lokey, Howard & Zukin as its financial advisor. In the Retention Application, the Bondholder Committee requested authority "to enter into a letter agreement dated as of July 12, 1990 establishing the terms and conditions of HLHZ's engagement by the Committee" and attached the Retainer Agreement as an exhibit. The Retainer Agreement specified that Houlihan Lokey would be "paid . . . a fee of $100,000 per month . . . plus reasonable out-of-pocket expenses." The Retainer Agreement acknowledged that it was "subject to the approval of the Court, which the Committee will promptly use its best efforts to obtain." The Retention Application also stated that Houlihan Lokey would be paid $100,000 per month and that "[a]ll fees so paid remain subject to subsequent Bankruptcy Court approval in a final fee application to be submitted to the Court." Neither the Retention Application nor the Retainer Agreement explicitly mentioned § 328.

The bankruptcy court subsequently authorized the Bondholder Committee and the Unsecured Creditors Committee to retain Houlihan Lokey. The court order

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professional's retention, such that § 330 is applicable. Our point is merely that if a professional's retention application cites § 328 and the bankruptcy court's order otherwise makes clear that the retention has been approved pursuant to § 328, we will consider § 328 to apply even if the retention order does not specifically reference that section.

provided that:

> the Debtors are authorized to pay [Houlihan Lokey] the amount of $100,000 per month and reimburse expenses as set forth in the Application and Retainer Agreement subject to review by the court in a final fee application to be submitted by [Houlihan Lokey] on notice pursuant to relevant provisions of the Bankruptcy Code.

The Retention Order did not mention § 328 or § 330.

Houlihan Lokey submitted a First Amended Final Fee Application in August 1995.[3] The bankruptcy court assessed the reasonableness of Houlihan Lokey's fees and expenses under 11 U.S.C. § 330 and entered orders granting one-half of Houlihan Lokey's requested fees and costs and denying the other half.

On appeal, the district court determined that Houlihan Lokey had been employed pursuant to § 328, reversed the bankruptcy court's ruling and remanded the case "to award Houlihan the fees requested unless the bankruptcy court finds that the terms and conditions of its fee agreement are

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[3] Houlihan Lokey submitted its first Final Fee Application "pursuant to Sections 327 and 330," rather than pursuant to § 328. In its First Amended Final Fee Application, Houlihan Lokey stated that the applicable legal standard of review was that of § 328. Circle K contends that, because Houlihan Lokey cited § 330 in its first Final Fee Application, it should be judicially estopped from now arguing that § 328 applies. We need not resolve this issue in light of the ruling that § 328 does not apply.

'improvident in light of developments not capable of being anticipated at the time of the fixing of the terms and conditions'" -- the standard of review under § 328. After Circle K's unsuccessful interlocutory appeal to this Circuit,[4] the bankruptcy court entered an order granting Houlihan Lokey the full amount of fees and costs requested, as well as interest and attorney's fees. Circle K appealed to the district court, which denied Circle K's appeal and affirmed the bankruptcy court. Circle K timely appealed to this Court.

Standard of Review

We review de novo a district court's decision on an appeal from a bankruptcy court. We also review de novo the bankruptcy court's original decision of the applicable statutory provision, and its decision to review Houlihan Lokey's fees for reasonableness under 11 U.S.C. § 330. *See Friedman Enters. v. B.U.M. Int'l, Inc. (In re B.U.M. Int'l Inc.)*, 229 F.3d 824, 827-28 (9th Cir. 2000); *see also Pitrat v. Reimers (In re Reimers)*, 972 F.2d 1127, 1128 (9th Cir. 1992).

Discussion

[1] We must decide whether Houlihan Lokey was retained pursuant to 11 U.S.C. § 328, such that the bankruptcy court was not permitted to engage in a § 330 reasonableness inquiry. We conclude that because the retention application did not unambiguously specify that § 328 governed, § 330 review was appropriate.

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[4] We dismissed Circle K's appeal for lack of jurisdiction.

The facts of this case are similar to those in our recent decision *In re B.U.M. Int'l.* There, the bankruptcy court approved a professional's employment agreement, which provided for a flat monthly fee as well as a contingency fee. The retention application failed to cite § 328, and the bankruptcy court's retention order stated that "all fees and costs of Friedman are subject to Court approval." *In re B.U.M. Int'l*, 229 F.3d at 826. When the professional applied to collect its fees, the bankruptcy court conducted a § 330 inquiry and denied the contingency fees altogether. *Id.* at 827. This Court affirmed, holding that the bankruptcy court had only conditionally approved the employment application and that § 330 review was therefore appropriate. *Id.* at 829-30.

[2] Here, even though the Bondholder Committee sought prior approval from the bankruptcy court to enter into a flat monthly fee arrangement with Houlihan Lokey, the Retention Application did not specifically refer to § 328 and it provided that "all fees so paid *remain subject to subsequent Bankruptcy Court approval* in a final fee application to be submitted to the Court." (Emphasis added.) The Retention Order also made no reference to either § 328 or § 330. Finally, the bankruptcy court authorized the Bondholder Committee to pay Houlihan Lokey $100,000 per month, "*subject to review by the court* in a final fee application to be submitted by [Houlihan Lokey] . . . ." (Emphasis added.) Therefore, we conclude that the bankruptcy court only conditionally approved Houlihan Lokey's retention and that § 328 does not apply. The bankruptcy court was originally correct to review Houlihan Lokey's fees for reasonableness under § 330.

Our conclusion is bolstered by the bankruptcy court's stated belief that it had not unconditionally approved Houlihan Lokey's fees under § 328. In its original order denying Houlihan Lokey half of its requested fees and expenses, the bankruptcy court refused to apply § 328. On remand, as it carried out its instructions from the district court, the bankruptcy court explicitly stated that its intent had been to approve a retention on the basis of § 330, not § 328.

Moreover, another professional involved in this same bankruptcy proceeding, Merrill Lynch, *did* explicitly specify § 328 in its retention application. The bankruptcy court in its retention order stated that the debtors were empowered to pay Merrill Lynch "without further court order; provided, however, that all such payments of compensation and reimbursement of expenses by Debtors to Merrill Lynch shall be subject to the right of the Bankruptcy Court under 11 U.S.C. § 328(a) to review such payments." In contrast to Houlihan Lokey, Merrill Lynch properly invoked § 328 and the bankruptcy court acknowledged that fact.

[3] We respectfully disagree with the Fifth Circuit's decision in *Donaldson Lufkin & Jenrette Sec. Corp. v. Nat'l Gypsum Co. (In re Nat'l Gypsum Co.)*, 123 F.3d 861 (5th Cir. 1997). There the court held that a professional had been employed pursuant to § 328 even though § 328 was not specified in the retention application and the bankruptcy court's order stated that "[t]he Court retains the right to consider and approve the reasonableness and amount of DLJ's fees on both an interim and final basis." *Id.* at 862. In this Circuit, unless a professional is unambiguously employed pursuant to § 328, its professional fees will be reviewed for reasonableness under § 330. To ensure that § 328 governs the

review of a professional's fees, a professional must invoke the section explicitly in the retention application. Preferably, the retention order would specify that section as well.[5]

Conclusion

In this case, Houlihan Lokey failed unambiguously to invoke § 328 in its Retention Application, and the bankruptcy court's Retention Order did not mention § 328 or otherwise make clear that § 328 applied. Therefore, § 330 review was appropriate. We reverse the district court's decision and remand the case with instructions to remand the case to the bankruptcy court. The bankruptcy court may grant such fees and expenses as it finds appropriate under 11 U.S.C. sec. 330, subject to appropriate review by the district court.

REVERSED AND REMANDED.

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[5] Once again, we encourage bankruptcy courts to identify clearly which statutory provision applies to a professional's retention. Of course, failure to cite either § 330 or § 328 is not fatal, as the context of the retention order should ordinarily make clear which provision is applicable.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-15361

[Filed December 5, 2001]

In re: THE CIRCLE K CORPORATION, *Debtor*.	)
THE CIRCLE K CORPORATION, *Appellant*,	)
v.	)
HOULIHAN, LOKEY, HOWARD & ZUKIN, INC., *Appellee*.	)

OPINION

On Appeal from
United States District Court
for the District of Arizona
No. CV-99-00492-RGS
Judge Roger G. Strand

JUDGES:
Before: Henry A. Politz,* William A. Fletcher and Raymond C. Fisher, Circuit Judges.

SUMMARY

Bankruptcy/Litigation and Procedure (Civil)

The court of appeals reversed a judgment of the district court. The court held that unless the retention application of a professional employed in the course of a Chapter 11 bankruptcy proceeding unambiguously specifies that it seeks approval under 11 U.S.C. § 328, it is subject to review under 11 U.S.C. § 330.

Section 328(a) of the Bankruptcy Code permits a professional employed in the course of a Chapter 11 bankruptcy proceeding to have the terms and conditions of its employment pre-approved by the bankruptcy court, such that the bankruptcy court may alter the agreed-upon compensation only if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions. In the absence of preapproval under § 328, fees are reviewed at the conclusion of the bankruptcy proceeding under a reasonableness standard pursuant to § 330(a)(1).

Appellant The Circle K Corporation filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

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* The Honorable Henry A. Politz, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

Thereafter, the Official Debentures Committee (Committee) sought approval from the bankruptcy court to retain appellee Houlihan, Lokey, Howard and Zukin (HLHZ) as its financial advisor. In the Retention Application, the Committee requested authority to enter into an agreement establishing the terms and conditions of HLHZ's engagement, as outlined in the attached Retainer Agreement, which specified that HLHZ would be paid a fee of $100,000 per month plus reasonable out-of-pocket expenses. The Retainer Agreement acknowledged that it was subject to the approval of the Court, which the Committee would promptly use its best efforts to obtain. The Retention Application also stated that HLHZ would be paid $100,000 per month and that all fees paid would remain subject to subsequent bankruptcy court approval in a final fee application to be submitted to the Court. Neither the Retention Application nor the Retainer Agreement explicitly mentioned § 328.

The bankruptcy court subsequently authorized the Committee and the Unsecured Creditors Committee to retain HLHZ. The court order provided that the debtors were authorized to pay HLHZ the amount of $100,000 per month and reimburse expenses as set forth in the Application and Retainer Agreement subject to review by the court in a final fee application to be submitted by HLHZ on notice pursuant to relevant provisions of the Bankruptcy Code. The Retention Order did not mention § 328 or § 330.

When HLHZ submitted a First Amended Final Fee Application, the bankruptcy court assessed the reasonableness of HLHZ's fees and expenses under § 330 and entered orders granting one-half of Houlihan Lokey's requested fees and costs and denying the other half. HLHZ appealed, and the

district court determined that HLHZ had been employed pursuant to § 328, reversed the bankruptcy court's ruling and remanded the case to award HLHZ the fees requested unless the bankruptcy court would find that the terms and conditions of its fee agreement were improvident under the standard of review prescribed in § 328. The bankruptcy court subsequently entered an order granting HLHZ the full amount of fees and costs requested, as well as interest and attorney's fees. Circle K appealed to the district court, which denied its appeal and affirmed the bankruptcy court.

Circle K appealed.

[1] Because the retention application did not unambiguously specify that § 328 governed, § 330 review was appropriate. [2] Even though the Committee sought prior approval from the bankruptcy court to enter into a flat monthly fee arrangement with HLHZ, the Retention Application did not specifically refer to § 328, and it provided that all fees so paid would remain subject to subsequent bankruptcy court approval in a final fee application to be submitted to the court. The Retention Order also made no reference to either § 328 or § 330. Finally, the bankruptcy court authorized the Committee to pay HLHZ $100,000 per month, subject to review by the court in a final fee application to be submitted by HLHZ. Thus, the bankruptcy court only conditionally approved HLHZ's retention and § 328 did not apply.

[3] Unless a professional is unambiguously employed pursuant to § 328, its professional fees will be reviewed for reasonableness under § 330. To ensure that § 328 governs the

review of a professional's fees, a professional must invoke the section explicitly in the retention application.

COUNSEL

Christopher H. Bayley and Lori A. Schmig, Snell & Wilmer L.L.P., Phoenix, Arizona, for the appellant.

Thomas J. Salerno, Donald A. Wall and Jordan A. Kroop, Squire, Sanders & Dempsey L.L.P., Phoenix, Arizona, for the appellee.

OPINION

FISHER, Circuit Judge:

Overview

This appeal presents the question of how a professional employed in the course of a Chapter 11 bankruptcy proceeding can be assured that its fees will be reviewed under the standards of 11 U.S.C. § 328, rather than § 330. Section 328(a) permits a professional to have the terms and conditions of its employment pre-approved by the bankruptcy court, such that the bankruptcy court may alter the agreed-upon compensation only "if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions."[1] In the absence of preapproval under

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[1] "The trustee . . . with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable

§ 328, fees are reviewed at the conclusion of the bankruptcy proceeding under a reasonableness standard pursuant to 11 U.S.C. § 330(a)(1).

We hold that unless a professional's retention application unambiguously specifies that it seeks approval under § 328, it is subject to review under § 330. As a matter of good practice, the bankruptcy court's retention order should likewise specifically confirm that the retention has been approved pursuant to § 328 so as to avoid any ambiguity. The absence of such a specific reference in the bankruptcy court's order, however, would not of itself

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terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. § 328(a).

In contrast, Section 330 provides that the bankruptcy court "may award to a trustee, an examiner, a professional person employed under section 327 or 1103 - (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Section 328 permits a professional to avoid 11 U.S.C. § 330, which specifies the procedure to compensate a professional at the conclusion of the bankruptcy proceeding.

automatically override the retention application's invocation of § 328.[2]

Factual and Procedural Background

The Circle K Corporation filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in May 1990. In July, the Official Debentures Committee ("Bondholder Committee") sought approval from the bankruptcy court to retain Houlihan, Lokey, Howard & Zukin as its financial advisor. In the Retention Application, the Bondholder Committee requested authority "to enter into a letter agreement dated as of July 12, 1990 establishing the terms and conditions of HLHZ's engagement by the Committee" and attached the Retainer Agreement as an exhibit. The Retainer Agreement specified that Houlihan Lokey would be "paid . . . a fee of $100,000 per month . . . plus reasonable out-of-pocket expenses." The Retainer Agreement acknowledged that it was "subject to the approval of the Court, which the Committee will promptly use its best efforts to obtain." The Retention Application also stated that Houlihan Lokey would be paid $100,000 per month and that "[a]ll fees so paid remain subject to subsequent Bankruptcy Court approval in a final fee application to be submitted to the

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[2] Of course, a bankruptcy court is not compelled to accept a professional's employment under § 328 merely because the application cites that statutory provision. The bankruptcy court is free to make clear that it is only conditionally approving the professional's retention, such that § 330 is applicable. Our point is merely that if a professional's retention application cites § 328 and the bankruptcy court's order otherwise makes clear that the retention has been approved pursuant to § 328, we will consider § 328 to apply even if the retention order does not specifically reference that section.

Court." Neither the Retention Application nor the Retainer Agreement explicitly mentioned § 328.

The bankruptcy court subsequently authorized the Bondholder Committee and the Unsecured Creditors Committee to retain Houlihan Lokey. The court order provided that:

> the Debtors are authorized to pay [Houlihan Lokey] the amount of $100,000 per month and reimburse expenses as set forth in the Application and Retainer Agreement subject to review by the court in a final fee application to be submitted by [Houlihan Lokey] on notice pursuant to relevant provisions of the Bankruptcy Code.

The Retention Order did not mention § 328 or § 330.

Houlihan Lokey submitted a First Amended Final Fee Application in August 1995.[3] The bankruptcy court assessed the reasonableness of Houlihan Lokey's fees and expenses under 11 U.S.C. § 330 and entered orders granting one-half of Houlihan Lokey's requested fees and costs and denying the other half.

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[3] Houlihan Lokey submitted its first Final Fee Application "pursuant to Sections 327 and 330," rather than pursuant to § 328. In its First Amended Final Fee Application, Houlihan Lokey stated that the applicable legal standard of review was that of § 328. Circle K contends that, because Houlihan Lokey cited § 330 in its first Final Fee Application, it should be judicially estopped from now arguing that § 328 applies. We need not resolve this issue in light of the ruling that § 328 does not apply.

On appeal, the district court determined that Houlihan Lokey had been employed pursuant to § 328, reversed the bankruptcy court's ruling and remanded the case "to award Houlihan the fees requested unless the bankruptcy court finds that the terms and conditions of its fee agreement are 'improvident in light of developments not capable of being anticipated at the time of the fixing of the terms and conditions'" — the standard of review under § 328. After Circle K's unsuccessful interlocutory appeal to this Circuit,[4] the bankruptcy court entered an order granting Houlihan Lokey the full amount of fees and costs requested, as well as interest and attorney's fees. Circle K appealed to the district court, which denied Circle K's appeal and affirmed the bankruptcy court. Circle K timely appealed to this Court.

Standard of Review

We review de novo a district court's decision on an appeal from a bankruptcy court. We also review de novo the bankruptcy court's original decision of the applicable statutory provision, and its decision to review Houlihan Lokey's fees for reasonableness under 11 U.S.C. § 330. *See Friedman Enters. v. B.U.M. Int'l, Inc. (In re B.U.M. Int'l Inc.)*, 229 F.3d 824, 827-28 (9th Cir. 2000); *see also Pitrat v. Reimers (In re Reimers)*, 972 F.2d 1127, 1128 (9th Cir. 1992).

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[4] We dismissed Circle K's appeal for lack of jurisdiction.

Discussion

[1] We must decide whether Houlihan Lokey was retained pursuant to 11 U.S.C. § 328, such that the bankruptcy court was not permitted to engage in a § 330 reasonableness inquiry. We conclude that because the retention application did not unambiguously specify that § 328 governed, § 330 review was appropriate.

The facts of this case are similar to those in our recent decision *In re B.U.M. Int'l.* There, the bankruptcy court approved a professional's employment agreement, which provided for a flat monthly fee as well as a contingency fee. The retention application failed to cite § 328, and the bankruptcy court's retention order stated that "all fees and costs of Friedman are subject to Court approval." *In re B.U.M. Int'l,* 229 F.3d at 826. When the professional applied to collect its fees, the bankruptcy court conducted a § 330 inquiry and denied the contingency fees altogether. *Id.* at 827. This Court affirmed, holding that the bankruptcy court had only conditionally approved the employment application and that § 330 review was therefore appropriate. *Id.* at 829-30.

[2] Here, even though the Bondholder Committee sought prior approval from the bankruptcy court to enter into a flat monthly fee arrangement with Houlihan Lokey, the Retention Application did not specifically refer to § 328 and it provided that "all fees so paid *remain subject to subsequent Bankruptcy Court approval* in a final fee application to be submitted to the Court." (Emphasis added.) The Retention Order also made no reference to either § 328 or § 330. Finally, the bankruptcy court authorized the Bondholder Committee to pay Houlihan Lokey $100,000 per month,

"*subject to review by the court* in a final fee application to be submitted by [Houlihan Lokey] ...." (Emphasis added.) Therefore, we conclude that the bankruptcy court only conditionally approved Houlihan Lokey's retention and that § 328 does not apply. The bankruptcy court was originally correct to review Houlihan Lokey's fees for reasonableness under § 330.

Our conclusion is bolstered by the bankruptcy court's stated belief that it had not unconditionally approved Houlihan Lokey's fees under § 328. In its original order denying Houlihan Lokey half of its requested fees and expenses, the bankruptcy court refused to apply § 328. On remand, as it carried out its instructions from the district court, the bankruptcy court explicitly stated that its intent had been to approve a retention on the basis of § 330, not § 328.

Moreover, another professional involved in this same bankruptcy proceeding, Merrill Lynch, *did* explicitly specify § 328 in its retention application. The bankruptcy court in its retention order stated that the debtors were empowered to pay Merrill Lynch "without further court order; provided, however, that all such payments of compensation and reimbursement of expenses by Debtors to Merrill Lynch shall be subject to the right of the Bankruptcy Court under 11 U.S.C. § 328(a) to review such payments." In contrast to Houlihan Lokey, Merrill Lynch properly invoked § 328 and the bankruptcy court acknowledged that fact.

[3] We respectfully disagree with the Fifth Circuit's decision in *Donaldson Lufkin & Jenrette Sec. Corp. v. Nat'l Gypsum Co. (In re Nat'l Gypsum Co.),* 123 F.3d 861 (5th Cir. 1997). There the court held that a professional had been

employed pursuant to § 328 even though § 328 was not specified in the retention application and the bankruptcy court's order stated that "[t]he Court retains the right to consider and approve the reasonableness and amount of DLJ's fees on both an interim and final basis." *Id.* at 862. In this Circuit, unless a professional is unambiguously employed pursuant to § 328, its professional fees will be reviewed for reasonableness under § 330. To ensure that § 328 governs the review of a professional's fees, a professional must invoke the section explicitly in the retention application. Preferably, the retention order would specify that section as well.[5]

Conclusion

In this case, Houlihan Lokey failed unambiguously to invoke § 328 in its Retention Application, and the bankruptcy court's Retention Order did not mention § 328 or otherwise make clear that § 328 applied. Therefore, § 330 review was appropriate. We reverse the district court's decision and remand the case with instructions to grant Houlihan Lokey's fees and expenses in accordance with the bankruptcy court's § 330 assessment.

REVERSED AND REMANDED.

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[5] Once again, we encourage bankruptcy courts to identify clearly which statutory provision applies to a professional's retention. Of course, failure to cite either § 330 or § 328 is not fatal, as the context of the retention order should ordinarily make clear which provision is applicable.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

CIV 99-492-PHX-RGS

[Filed February 8, 2000]

In re	)
	)
THE CIRCLE K CORPORATION, et al.,	)
Debtor,	)
	)
THE CIRCLE K CORPORATION,	)
Appellant,	)
	)
v	)
	)
HOULIHAN, LOKEY, HOWARD & ZUKIN, INC.,	)
Appellee.	)
	)

ORDER

I. INTRODUCTION

Currently pending before the Court is Appellant, the Circle K Corporation's appeal from the bankruptcy court's order filed on January 27, 1999 approving the payment of $3,507,699.35 in fees and costs incurred by Houlihan, Lokey,

Howard & Zukin, Inc. Oral arguments were heard on December 7, 1999 at which time the Court took the matter under advisement. After having fully considered the issues raised by the parties, the Court now rules.

II. BACKGROUND

On May 15, 1990, Circle K and its affiliates, engaged in the business of operating convenience stores and related facilities, filed petitions for reorganization under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code"). Numerous committees were formed in the case, one of which was the Official Debentureholder Committee ("Bondholders' Committee.") The Bondholders' Committee represented the holders of approximately $425 million of subordinated public debt of Circle K. In July, 1990, the Bondholder's committee sought an order by the bankruptcy court approving the retention of Houlihan, Lokey, Howard & Zukin ("Houlihan Lokey") as financial advisor to the Bondholders' Committee. Doc. 8, exh. 1. On September 19, 1990, the bankruptcy court filed its order authorizing the retention of Houlihan Lokey as financial advisor to the Bondholders' Committee. *Id.*, exh. 3.

The bankruptcy court's order authorizing the retention of Houlihan Lokey provided, in pertinent part:

> IT IS FURTHER ORDERED that the Debtors are authorized to pay [Houlihan Lokey] the amount of $100,000 per month and reimburse expenses as set forth in the Application and Retainer Agreement subject to review by the court in a final fee application to be submitted

> by [Houlihan Lokey] on notice pursuant to relevant provisions of the Bankruptcy Code.

Doc. 8, exh. 3 at 2.

Despite the fact that the bankruptcy court's retention order did not require that Houlihan Lokey keep time records, Houlihan Lokey later agreed to provide the U.S. Trustee and other parties with hourly time analyses and explanations. This arrangement is reflected in correspondence from the Trustee to Houlihan Lokey dated November 22, 1991, and correspondence from Houlihan Lokey to the Trustee dated December 6, 1991. *See* doc. 8, exh. 24 C and D.

On October 8, 1993, Houlihan Lokey submitted its final fee application which provided that "pursuant to Sections 327 and 330 of Title 11 of the United States Bankruptcy Code (the "Code") and Rule 2016 of the Bankruptcy Rules" Houlihan Lokey sought approval of its final fee application for compensation and reimbursement of services rendered and expenses incurred for the period July 1990 through and including April 1993. Specifically, Houlihan Lokey sought approval of compensation in the amount of $3,300,000 ($100,000 a month for 33 months) and $207,699.35 for reimbursement of costs and expenses incurred during the application period.

On December 6, 1993, Circle K filed its objections to Houlihan Lokey's fee application contending that the bankruptcy court must deny Houlihan Lokey's application in its entirety and require that Houlihan Lokey disgorge all monies advanced by Circle K during the course of the

bankruptcy since the services rendered by Houlihan Lokey (1) were not reasonable, actual and necessary as required by 11 U.S.C. § 330; and (2) failed to benefit the bankruptcy estate. Doc. 3, exh. 18. Houlihan Lokey filed its response to Circle K's objections on May 23, 1994 alleging that "because the [bankruptcy court] approved a definitive fee agreement when it issued its September 1990 Order appointing Houlihan and necessarily determined at that time that the retention of Houlihan met the reasonableness standards of 11 U.S.C. § 330, the only proper issue now before the [bankruptcy court] is whether Houlihan's retention was 'improvident in light of developments not capable of being anticipated originally'" pursuant to 11 U.S.C. § 328. Doc. 3, exh. 19 at 5. Alternatively, Houlihan Lokey argued that even under a § 330 reasonableness analysis, its fee application would be appropriate. *Id.* at 6.

On August 22, 1995, Houlihan Lokey filed a first amended final fee application. Again, Circle K objected to Houlihan Lokey's first amended fee application. Circle K alleged that the bankruptcy court should deny Houlihan Lokey's fee application since Houlihan Lokey (1) failed to provide adequate time accounting; (2) violated its agreement with the United States Trustee regarding time keeping practices; (3) failed to satisfy § 330's standards for reasonableness; (4) failed to demonstrate that its services actually conveyed a benefit to the estate; (5) failed to submit all back-up documentation within the time specified by the bankruptcy court and (6) failed to support its reimbursement requests by affidavit or declaration testimony. Doc. 3, exh. 31 at ii.

In an Interim Order signed October 3, 1995, the bankruptcy judge awarded Houlihan Lokey one-half of the fees requested. The Court explained:

> . . . Regrettably, applicant's failure to keep detailed time records and consequent inability to produce a fully detailed fee application prevent approval of the full professional fee.
>
> In short, applicant has failed to provided sufficient detail to justify a professional fee of $3,507,699.35. Given the particular factual circumstances of this case, the Court will adopt objector's suggestion that one-half of the requested fees be approved, in lieu of denial of the entire application.

Doc. 3, exh. 36 at 2. In response to the bankruptcy court's interim order, Houlihan Lokey filed a Statement of Position in which it (1) admitted that it did not maintain time records consistent with its agreement with the U.S. Trustee; (2) submitted that it nonetheless provided sufficient detail to permit the Court to evaluate the nature and extent of the professional services provided; and (3) offered to "attempt to generate time records from and after November, 1991, through April, 1993 in ½ hour increments." Doc. 3, exh. 37 at 2-3. Houlihan Lokey further requested that the Court withhold entry of the final order until it reviewed the additional time entries prepared in ½ hour increments. *Id.*

Subsequently, in an order signed January 17, 1996, the bankruptcy court affirmed its earlier decision. The bankruptcy court found that even assuming that Houlihan

Lokey's retention was a flat fee retention, "the agreement with the U.S. Trustee, the requirement of a final application and the fact Houlihan's application specifically referenced section 330, all indicate [Houlihan Lokey] was, or should have been, aware of a duty to provide detailed fee information." Doc. 3, exh. 42 at 16. Thus, because it determined that the detail in Houlihan Lokey's application fell "woefully short of that required by the U.S. Trustee and section 330(a)," the bankruptcy court accepted Circle K's offer to grant one-half of Houlihan Lokey's requested fees." *Id.* at 17. On January 29, 1996, the bankruptcy court filed its final order granting in part and denying in part Houlihan Lokey's first amended final fee application. Doc. 3, exh. 43.

On January 30, 1996, Houlihan Lokey filed a motion for reconsideration of the bankruptcy court's January 17, 1996 order. In a minute entry dated April 2, 1996, the bankruptcy court denied Houlihan Lokey's motion for reconsideration.

On April 12, 1996, Houlihan Lokey filed its notice of appeal in the United States District Court for the District of Arizona appealing the bankruptcy court's order dated January 17, 1996. In its appeal, Houlihan Lokey alleged that the bankruptcy court erred in denying Houlihan Lokey one-half of its fees and costs sought for failure to maintain "meticulously accurate" time-keeping records despite the fact that such time-keeping standards were not mentioned its Houlihan Lokey retention order. See doc. 3, exh. 56. In its responsive brief filed on August 21, 1996, Circle K argued that the bankruptcy court applied the correct standard in reducing by one-half the compensation and expenses sought

by Houlihan Lokey's in its fee application. Briefing on Houlihan Lokey's appeal was completed on August 30, 1996.

This Court, in its Order filed on April 10, 1998, granted the relief sought by Houlihan Lokey. This Court specifically found that the bankruptcy court was limited to a review of Houlihan Lokey's first amended fee application under 11 U.S.C. § 328(a), i.e. whether Houlihan Lokey's retention was "improvident in light of developments not capable of being anticipated." Doc. 3, exh. 62. Consequently, this Court reversed and remanded this matter to the bankruptcy court for it to award Houlihan Lokey the fees requested unless the bankruptcy court finds that the terms and conditions of Houlihan Lokey's fee agreement are "improvident in light of developments not capable of being anticipated at the time of the fixing of the terms and conditions." *Id.*

Following the District Court's reversal and remand, on October 9, 1998, Circle K requested that the bankruptcy court set a discovery schedule establishing (1) approximately 120 days to conduct discovery, (2) a deadline at least two weeks prior to the evidentiary hearing to exchange a list of witnesses and exhibits and (3) at least one full day to conduct an evidentiary hearing. Doc. 3, exh. 91. By minute order dated November 25 1998, the bankruptcy court indicated that its initial impression was to approve the aspects of the fee application that had not been opposed but added that it still believed the application was deficient. Doc. 3, exh. 98. Thereafter, on January 27, 1999, the bankruptcy court filed

its order authorizing the payment of fees and costs incurred by Houlihan Lokey in the amount of $3,507,699.35.[1]

Subsequently, on March 15, 1999, Circle K filed its notice of appeal of the bankruptcy court's January 27, 1999 order.

III. DISCUSSION

A. Issues Raised on Appeal

Circle K raises several issues on appeal. First, Circle K contends that this Court erred in requiring the bankruptcy court on remand to apply the standard set forth in 11 U.S.C. § 328 to Houlihan Lokey's fee application. Second, Circle K argues that this Court committed reversible error in characterizing Houlihan Lokey's monthly payment referenced in the bankruptcy court's retention order as a pre-authorized flat fee rather than a periodic retainer for interim payments. Additionally, Circle K alleges that on remand, the bankruptcy court committed reversible error in approving Houlihan Lokey's claimed expenses without backup or supporting documentation. Lastly, Circle K argues that the bankruptcy court committed reversible error by refusing to allow Circle K to conduct discovery and by refusing to hold an evidentiary

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[1] The bankruptcy court's January 27, 1999 order also awarded Houlihan Lokey (1) interest at the rate of 5.16% on $327,306.04 held back from Houlihan Lokey after January 17, 1996, (2) reimbursement of expenses associated with obtaining the letter of credit in lieu of a supersedious bond with respect to the appeal to this Court in the amount of $39,660.88 and (3) reimbursement of the legal fees and expenses incurred with respect to prosecuting its fee application in the amount of $196,044.08. See doc. 3, exh. 103.

hearing relating to the issue of whether Houlihan Lokey's retention was improvident under circumstances incapable of being anticipated at the time of retention.

1. Did this District Court err in requiring the bankruptcy court to apply the standard articulated in 11 U.S.C. § 328 to Houlihan Lokey's fee application or by characterizing the monthly payments to Houlihan Lokey's as a pre-authorized flat fee rather than a periodic retainer for interim payments?

In response to Circle K's appeal, Houlihan Lokey contends that the doctrine of law of the case bars this Court's reconsideration of Circle K's arguments regarding whether § 328 governs the bankruptcy court's review of Houlihan Lokey's retention and whether the monthly payments set forth in Houlihan Lokey's retention order was a pre-authorized flat fee or a periodic retainer for interim payments. The Court agrees.

The doctrine of "law of the case" generally precludes a court from reconsidering an issue or issues that have already been decided in the identical case, either by the same court or a superior court. *U.S. v. Real Property Located at Incline Village*, 976 F.Supp. 1327, 1353 (D.Nev. 1997); *United States v. Alexander*, 106 F.3d 874, 876 *(citing Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir.), *cert. denied,* 113 S.Ct. 24423 (1993)). As the court in Real Property Located At Incline Village explained:

> The law of the case doctrine is routinely characterized not as a limitation on the power

> of a tribunal to revisit prior rulings, but rather as a 'guide' to the court's exercise of its discretion. The doctrine is usually described not as a rule of substantive law, but a rule of practice designed to protect both the court and the litigants before it from repeated reargurnents of issues already decided.

Property Located At Incline Village, 976 F.Supp. at 1353 *(internal citations omitted)*.

However, a court may exercise its discretion to revisit and reverse a prior ruling only if one of the five following grounds exist: (1) a clearly erroneous prior ruling, (2) an intervening change in controlling law, (3) substantially different evidence, (4) other changed circumstances, and (5) that manifest injustice would result were the prior ruling permitted to stand. *Id.*; *Thomas v. Bible,* 983 F.2d at 155. "Under the law of the case doctrine, a previous decision on a factual or legal issue must be followed in all subsequent proceedings in the trial court or on a later appeal in the appellate court, unless the court is persuaded that one of these five exception requires otherwise."

In the present case, the Court is not persuaded that any of the five exceptions exist. To the extent Circle K attempts to argue that this Court's prior Order is clearly erroneous, the Court disagrees. In *In re National Gypsum Co.*, 123 F.3d 861 (5th Cir.1997), a decision not referenced in this Court's prior Order, the court considered whether its order approving the retention agreement between the debtor and company hired to provide professional services for the debtor gave prior fee approval pursuant to 11 U.S.C. § 328. National

Gypsum Company recorded an agreement entered into between itself and Donaldson Lufkin and Jenrette Securities Corporation ("DLJ") which provided that National Gypsum would compensate DLJ $125,000 per month. The bankruptcy court's retention order further provided that "[t]he Court retains the right to consider and approve the reasonableness and amount of DLJ's fees on both an interim and final basis." *Id.* at 862. Pursuant to the retention order, DLJ submitted its final fee application. After a hearing on National Gypsum's objections to DLJ's final fee application, the bankruptcy court reduced DLJ's fees by $825,000. *Id.*

On appeal, the Fifth Circuit reversed the bankruptcy court's reduction of fees owing DLJ. The Fifth Circuit reasoned that the bankruptcy court, by its original retention order, expressly approved the terms of the agreement between National Gypsum and consistent with 11 U.S.C. § 328. Further, the court held that by retaining the right "to consider and approve the reasonableness and amount of DLJ's fees on both an interim and final basis," the bankruptcy court was merely reiterating its control of the compensation in the event of subsequent and unanticipated circumstances affecting the reasonableness of the agreed upon fee pursuant to the language of 11 U.S.C. § 328. *Id.* at 863.

Without consideration given to copies of the National Gypsum record on appeal attached as exhibits to Houlihan Lokey's responsive brief,[2] the Court finds the National Gypsum decision bolsters this Court's prior ruling that the

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[2] The Court will grant Circle K's Motion to Strike exhibits "A" and "B" to Houlihan Lokey's Appellee's Responsive Brief and will not consider arguments in the brief related to said exhibits.

bankruptcy court improperly considered Houlihan Lokey's final fee application under the standard set forth in 11 U.S.C. § 330 rather than § 328. Specifically, in the present case, the bankruptcy court's order approving the retention of Houlihan Lokey provided that "the debtors are authorized to pay the amount of $100,000 per month and reimburse expenses as set forth in the retainer agreement subject to review by the court as a final fee application to be submitted by [Houlihan Lokey] on notice pursuant to relevant provisions of the Bankruptcy Code." Pursuant to the holding in *National Gypsum*, although the bankruptcy court's order allowed for "review" upon the filing of Houlihan Lokey's final fee application, because the order provided for an approved monthly payment, i.e. $100,000, the Court finds that the bankruptcy court was merely "reciting its control of the compensation in the event of subsequent and unanticipated circumstances affecting the reasonableness" of the agreed fee pursuant to 11 U.S.C. § 328.

Given the Court's analysis set forth in its prior order and given the holding in the *National Gypsum* case discussed above, the Court finds that its prior ruling is not clearly erroneous and, therefore, pursuant to the doctrine of law of the case, this Court is barred from reconsidering its holding set forth in its Order filed on April 10, 1998.

2. Did the Bankruptcy Court commit reversible error on remand in approving Houlihan Lokey's claimed expenses without backup or supporting documentation.

Upon remand, the bankruptcy court awarded $207,699.35 in costs. Circle K contends that the bankruptcy

court committed reversible error in awarding these costs without considering the reasonableness of Houlihan Lokey's application for costs pursuant to § 330. In response, Houlihan Lokey alleges that its award of costs by the bankruptcy court was sufficiently supported by "three hundred seventy-one pages of backup documents for its expenses." See doc. 7 at 45. Moreover, Houlihan Lokey contends that Circle K fails to reference any portion of the record establishing that the bankruptcy court neglected to consider the reasonableness ofHoulihan Lokey's application for costs.

Because Circle K fails to reference anything in the record which demonstrates that the bankruptcy court considered Houlihan Lokey's application for the payment of expenses under § 328 rather than § 330, the Court finds that it is unable to conclude that the bankruptcy court committed reversible error.

3. Did the bankruptcy court err in refusing to permit discovery or hold an evidentiary hearing on whether Houlihan Lokey's retention was improvident under circumstances incapable of being anticipated at the time of retention?

Lastly, Circle K alleges that the bankruptcy court committed reversible error in refusing to allow it to conduct discovery and hold an evidentiary hearing on the issue of whether Houlihan Lokey's retention was improvident under circumstances incapable of being anticipated at the time of retention.

A lower court's decision not to permit further discovery is reviewed for abuse of discretion. *In re Filtercore, Inc.*, 163 F.3d 570, 584 (9th Cir.1998); *Qualls v. Blue Cross of California, Inc.*, 22 F.3d 839, 844 (9th Cir.1994). However, in the very brief portions of its opening brief arguing that the bankruptcy court erred in refusing to allow it to conduct discovery on the issue of whether Houlihan Lokey's retention was improvident under circumstances incapable of being anticipated at the time of retention, Circle K fails to provide any basis from which this Court can conclude that the bankruptcy court abused its discretion in refusing to allow it to conduct the discovery requested.

With respect to Circle K's contention that the bankruptcy court erred in refusing to hold an evidentiary hearing, the Court recognizes that the bankruptcy code dealing with fee applications requires that a notice and a hearing be given before such applications are granted or denied. See 11 U.S.C. § 330(a). Although, a bankruptcy court is not required to conduct a full blown evidentiary hearing before approving fee applications. *See, e.g., In re Heck's Properties, Inc.*, 151 B.R. 739, 748 (S.D.W. Va.1992); *Industrial Ins. Serv. v. Zick (In re Zick)*, 931 F.2d 1124, 1129 (6th Cir.1991) (the dismissal of a Chapter 7 bankruptcy case does not require a "the formalities of a full-blown evidentiary hearing" when an adequate opportunity was provided for the parties to support their positions).

In the present case, the record reflects that the bankruptcy court held a hearing on October 27, 1998, following this Court's reversal and remand, and considered "the prior pleadings that were filed in connection with the matter . . .the original motion that was filed here... the

original response . . . and then an opposition from the debtor . . . [and] what the movant terms a first supplement, and a second supplement, and then a response that was filed by the debtor, and a reply submitted by the movant [and] listen[ed] with interest to the comments of counsel." Doc. 3, exh. 95 at 3.

Given the hearing held on October 27, 1998, the Court finds that the bankruptcy court complied with the notice and hearing requirements set forth in 11 U.S.C. § 330. Accordingly, the Court is unable to conclude that the bankruptcy court committed error by refusing to hold an "evidentiary hearing" on Houlihan Lokey's fee application.

Based upon the foregoing,

IT IS ORDERED affirming the bankruptcy court's January 27, 1999 order and denying Circle K the relief they seek on appeal;

IT IS FURTHER ORDERED granting Circle K's Motion to Strike Certain Exhibits to Houlihan Lokey's Responsive Brief. (Doc. 9).

DATED this 6th day of FEBRUARY, 2000.

/s/_____
HONORABLE ROGER S. STRAND
U.S. DISTRICT COURT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-15883
DC# CV-96-1330-RGS
Arizona (Phoenix)

[Filed July 30, 1998]

In re: THE CIRCLE K CORPORATION Debtor.	)
HOULIHAN, LOKEY, HOWARD & ZUKIN, INC., movant, Appellee, v THE CIRCLE K CORPORATION, debtor, Appellant.	)

ORDER

Before: HUG, Chief Judge, SCHROEDER and KOZINSKI, Circuit Judges

Appellee's motion to dismiss this appeal for lack of jurisdiction is granted. *See Stanley v. Crossland, Crossland, Chambers, McArthur & Lastreto, (In re Lakeshore Village Resort Ltd.)*, 81 F.3d 103, 107-108 (9th Cir. 1996). Accordingly, this appeal is dismissed.

DISMISSED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIV-96-1330-PHX-RGS

[Filed April 10, 1998]

In re	)
	)
THE CIRCLE K CORPORATION, et al.	)
Debtor,	)
	)
HOULIHAN, LOKEY, HOWARD & ZUKIN, et al.,	)
	)
Appellants,	)
	)
vs.	)
	)
THE CIRCLE K CORPORATION,	)
	)
Appellee.	)

ORDER

BACKGROUND

On May 15, 1990, Circle K and its affiliates filed petitions for relief under Chapter11 of Title 11 of the United

States Code, 11 USC § 101, *et seq.* (the "Bankruptcy Code"). Numerous committees were formed in the case, one of which was the Bondholders' Committee. The Bondolders' Committee represented the holders of approximately $ 425 million of subordinated public debt of Circle K. Houlihan, Lokey, Howard & Zukin ("Houlihan Lokey") was retained on July 12, 1990 as the financial advisor to the Bondholder's Committee.

Houlihan Lokey and the Bondholder's Committee agreed that Houlihan Lokey would be paid a fee of $100,000 a month plus reasonable out-of-pocket expenses incurred on the Committee's behalf. Exhibit 4, p.2. They further agreed that Houlihan Lokey's fees would be subject to the provisions of § 327 of the Bankruptcy Code. There was no agreement that Houlihan Lokey would keep or provide time records. The prevailing custom in the investment banking industry at that time was not to keep time records.

In the Order approving the retention, the bankruptcy court stated:

> IT IS FURTHER ORDERED that the Debtors are authorized to pay HLHZ the amount of $100,000 per month and reimburse expenses as set forth in the Application and Retainer Agreement subject to review by the court in a final fee application to be submitted by HLHZ on notice pursuant to relevant provisions of the Bankruptcy Code.

Exhibit 3. The Court's Order did not require Houlihan Lokey to keep time records, nor did it state that time records would have to be filed in support of the final fee application.

Houlihan Lokey later agreed to provide the U.S. Trustee and other parties with hourly time analyses and explanations. This arrangement is reflected in correspondence from the Trustee to Houlihan Lokey dated November 22, 1991, and correspondence from Houlihan Lokey to the Trustee dated December 6, 1991.

Houlihan Lokey refers to the time period between July 12, 1990 and December of 1991 (when it made the agreement with the U.S. Trustee) as the "Initial Retention Period." It contends that it had absolutely no obligation to keep time records during this period. It refers to the time period between January of 1992 and April of 1993 as the "Second Retention Period," during which it admits that it was suppose to submit time records to the U.S. Trustee in half-hour increments.

At the conclusion of its services, Houlihan Lokey submitted an application for fees in the amount of $3,300,000 ($100,000 a month for 33 months). It also requested costs in the amount of $207,699.35.

In an Interim Order signed October 3, 1995, the bankruptcy judge awarded Houlihan Lokey one-half of the fees requested. The Court explained:

> . . . Regrettably, applicant's failure to keep detailed time records and consequent inability

> to produce a fully detailed fee application prevent approval of the full professional fee.
>
> In short, applicant has failed to provided sufficient detail to justify a professional fee of $ 3,507,699.35. Given the particular factual circumstances of this case, the Court will adopt objector's suggestion that one-half of the requested fees be approved, in lieu of denial of the entire application.

In response to the Interim Order, Houlihan Lokey filed a Statement of Position in which it (1) admitted that it did not maintain time records consistent with its agreement with the U.S. Trustee; (2) submitted that it nonetheless provided sufficient detail to permit the Court to evaluate the nature and extent of the professional services provided; and (3) offered to "attempt to generate time records from and after November, 1991, through April, 1993 in ½ hour increments." Exhibit 23, p.2-3. Houlihan Lokey further requested that the Court withhold entry of the final order until additional time entries prepared in ½ hour increments. Houlihan Lokey did submit additional materials in support of fees for the Second Retention Period.

Subsequently, in an Order signed January 17, 1996, the bankruptcy court affirmed its earlier decision. It apparently believed that it had the power to determine the reasonableness of Houlihan Lokey's fees under § 330 and was not constrained by § 328(a).

RELEVANT STATUTORY PROVISIONS

11 U.S.C. § 327(a) provides in relevant part that the trustee, with the court's approval, may employ "professional persons [] that do not hold or represent an interest adverse to the estate; and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. § 328(a) provides:

> The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of development not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. § 330(a)(1)(A) provides that after notice and a hearing and subject to § 328, the court may award a professional person employed under § 327 a "reasonable compensation for actual, necessary services rendered by the" professional person. Section 330(a) (3) (A) provides:

> In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including --
>
> (A) the time spent on such services;
> (B) the rates charged for such services;
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue or task addressed; and
> (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

ANALYSIS

The result in this case is dictated by the Ninth Circuit case of *In re Reimers*, 972 F.2d 1127 (9th Cir. 1992). In that case, the trustee requested the bankruptcy court's permission to employ an attorney to prosecute a fraud claim on the estate's behalf. The fee agreement between the trustee and the attorney provided that the attorney would be awarded compensation of 40% of the amount he recovered for the estate. The bankruptcy court approved the employment and fee agreement in an order. The attorney succeeded in

recovering money for the estate on the claim. The trustee filed an application seeking authorization to pay the attorney 40% of the amount recovered.

At the first hearing on the application, the court directed the trustee to file additional supporting material. At a subsequent hearing, the court again requested additional materials, in particular records of the attorney's billable hours. These records were not provided. The bankruptcy court entered an order approving a payment less than half of what the attorney was entitled to under the agreement. The court arrived at this figure by estimating the number of hours spent on the case and multiplying this figure by the attorney's hourly rate.

The Ninth Circuit explained that the "bankruptcy court assumed that section 330 gave it the power to make a general 'reasonableness' review, despite the express language of section 328." The Ninth Circuit noted the bankruptcy court cited no authority for this proposition. The Ninth Circuit reversed on the ground that the bankruptcy court did not apply the correct law in reducing the fee, and remanded to the bankruptcy court to award compensation in accordance with the contingent fee agreement "unless the court, based on findings supported in the record, concludes that the agreement was 'improvident' in light of unforeseeable developments." *In re Reimers*, 972 F.2d at 1129.

In sum, the court held that where a bankruptcy court gives prior approval to a fee agreement as contemplated by § 328(a), the bankruptcy court is foreclosed from evaluating the final fee application under the "reasonableness" standard of § 330. It is instead limited to determining whether the

agreement was "improvident" based on "unforeseeable developments."

Similarly, in *In re Confections by Sandra, Inc.*, 83 B.R. 729 (1987), the BAP held that the bankruptcy court abused its discretion in refusing to award the debtor's attorney the greater of his normal hourly rate or a fixed percentage of the amount recovered where the bankruptcy court entered an order authorizing the employment "on the terms and conditions set forth in the Application" and the bankruptcy court did not find that unanticipated developments made the award improvident.

In the present case, the bankruptcy court entered an order approving the fee agreement. The bankruptcy court apparently believed that it could reduce Houlihan Lokey's fees pursuant to § 330 despite the language of § 328. According to *Reimers*, it did not have the power to do so because it had previously approved the fee agreement.

Appellee argues that §328 does not apply because (1) the retention application did not reference §328; (2) the parties agreed that Houlihan Lokey would provide the Debtors with monthly invoices detailing services rendered, which it apparently did not; (3) the agreement also provided that all fees paid pursuant to the parties' agreement would remain subject to final approval by the bankruptcy court; and (4) the initial fee application stated that the request for compensation was being made pursuant to §§ 327 and 330, not § 328.

Appellee fails to demonstrate that these are valid distinctions. Appellee does not cite any case law suggesting

that Houlihan Lokey had to reference § 328(a) in its initial fee request or that the bankruptcy court had to reference it in its order approving the employment agreement in order for § 328(a) to apply. The Court finds no reason for imposing such a requirement where § 325(a) applies on its face. Furthermore, Appellee fails to cite any authority suggesting that because the parties agreed Houlihan Lokey would provide a monthly itemization of its services Houlihan Lokey is only entitled to its fees if it did so, where nothing in the record suggests that there was an agreement that $100,000 monthly flat fee payment was conditioned on the submission of the reports.

Curiously, Appellee also contends that § 328(a) does not apply because the appointment order is not specific enough. In *In re Gillette Holdings, Inc.*, 143 B.R. 256, 259 (Bankr. D. Colo. 1992), the court stated that the "deference afforded under Section 328 does not apply unless the appointment order 'expressly and unambiguously states specific terms and conditions (e.g. specific hourly rate or contingency fee arrangements)' that are being approved pursuant to the first sentence of § 328." (quoting *In re C&P Auto Transport, Inc.*, 94 B.R. 682, 685 n. 4 (Bankr. E.D. Cal. 1988)). It is unclear how much more express and unambiguous the court's order could have been in this case. The bankruptcy judge expressly approved paying Houlihan Lokey $100,000 a month. Although the Court stated that this payment was "subject to review by the court in a final fee application to be submitted by HLHZ on notice pursuant to relevant provisions of the Bankruptcy Code," this does not change the analysis. As discussed above, pursuant to Ninth Circuit case law, the review "pursuant to relevant provisions of the Bankruptcy Code" is limited to review under § 328(a).

Consequently, the Court will reverse and remand to the bankruptcy court to award Houlihan the fees requested unless the bankruptcy court finds that the terms and conditions of its fee agreement are "improvident in light of developments not capable of being anticipated at the time of the fixing of the terms and conditions."

Accordingly,

IT IS ORDERED granting the relief sought by Appellant in its appeal (doc.#3).

FURTHER ORDERED reversing and remanding to the bankruptcy court for further proceedings consistent with this opinion.

DATED this 10th day of APRIL, 1998.

/s/_____
HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE

APPENDIX F

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA

Chapter 11, Nos. B-90-5052-PHX-GBN to B-90-5075-PHX-GBN, (Jointly Administered)

[Filed January 17, 1996]

In re the Circle K Corporation; Circle K Convenience Stores, Inc.; Circle K Management Company; Lar-lin, Inc.; First Circle Properties, Inc.; Utotem, Inc.; Utotem Markets of Arizona, Inc.; U Totem of Alabama, Inc.; U-totem of Colorado Inc.; U-totem of Miami, Inc.; Tic Toc Systems, Inc.; Monterre Properties, Inc.; Shop & Go, Inc.; Circle K General, Inc.; Circle K Hawaii, Inc.; Combined Aviation Co.; Charter Marketing Company (Connecticut); Charter Marketing Company; Mr. B's Oil Co., Inc.; Mr. B's Food Mart, Inc.; NPI Corporation; Old Colony Petroleum Company, Inc.; New England Petroleum Distributors, Inc.; and 44th Street & Camelback Limited Partnership,	)
Debtors.	)

COUNSEL:

Craig D. Hansen, Squire, Sanders & Dempsey, Phoenix, AZ, Attorneys for Houlihan, Lokey, Howard & Zukin.

Gehl P. Babinec, Sr. V.P. and General Counsel, The Circle K Corporation, Phoenix, AZ.

Christopher H. Bayley, Snell & Wilmer, Phoenix, AZ, Attorneys for Circle K Corporation.

JUDGES:
George B. Nielsen, Jr., Chief U.S. Bankruptcy Judge

ORDER

The objection of reorganized debtor Circle K Corporation ("debtor") to the amended final fee application of Houlihan, Lokey, Howard & Zukin, Inc. ("Houlihan") was submitted for decision. Document 17969, filed Aug. 22, 1995.

The Court is personally familiar with the services provided by the applicant investment banking firm and has no difficulty in concluding such services benefited in some measure these jointly administered estates. Regardless, applicant's failure to keep time records and consequent inability to produce a fully detailed fee application prevent approval of the full fee requested.[1]

---

[1] After repeatedly advising the Court further documentation of its application was not feasible, applicant now plans to further document its application. Transcript of September 14, at pages 8-

Applicant did not provide sufficient detail to justify a professional fee of $3,507,699.35. Given the particular circumstances of this case, the Court will exercise discretion, adopting objector's suggestion that one-half of the requested fees be approved, instead of denial of the entire application. *Cf. Neben & Starrett, Inc. v. Chartwell Financial Corp. (In re Park-Helena Corp.)*, 63 F.3d 877, 882 (9th Cir. 1995) (court has discretion to deny all fees in failure to disclose situation). The facts necessary for an understanding of this resolution follow.

I

On July 25, 1991, the Court entered a ruling on various objections to fee applications of professionals. Docket No. 4790. In the July order, the Court placed professionals on notice of billing and expense reimbursement practices that were not condoned or approved. These included:

> time entries for inter and intra-office conferences which do not contain a brief but full explanation of the nature and scope, etc. of the meeting;
>
> time entries for two individuals attending same function where one is essentially performing as

---

12, Docket No. 18064; Houlihan Statement of Position filed October 18, 1995; Docket No. 18062. This is presumably in response to the Court's preliminary ruling of October 3. Docket No. 18045. Debtor opposes the proposal. Docket No. 18072. Applicant filed revised monthly billings for January 7, 1992 through March 20, 1993, on November 20, 1995. Docket No. 18111. Debtor objected. This latter dispute is not currently ripe for adjudication.

> an assistant to the other absent some showing the presence of both was necessary and contributed to the outcome of the function;
>
> expenses for which no receipts are provided to back up and support the expense;
>
> overhead or profit factors that are properly considered a cost of business, such as Fax, reproduction costs, and computer research charges that are greater than the actual cost of the machine and materials;
>
> bar bills, on-board beverage services, in-room movies;
>
> air travel expenses for which frequent flyer miles paid for by the estate could have been used to reduce or eliminate such expenses; and
>
> travel time not billed at a reduced travel rate.

Transcript of July 9, 1991, at 13-20, Docket 4790.

On December 18, 1991, the Court entered an amended order. Docket 5960. This December order mandated that:

> 1) professionals submit detailed monthly statements to support their requests which contain:

a) a summary of total fees earned and expenses incurred by the professional during the month, and the total payment less 20% holdback;

b) a list of billing rates for each;

c) a summary of the time billed to each project during each calendar month by individual;

d) a detailed listing of services by each professional during the month categorized by project and day, with the time an individual spent on each discreet task;

e) an itemized list of expenses regarding the calendar months and backup receipts for lodging, air and mail expenses; and

f) a brief progress report outlining key projects involving significant outlays of time and expense.

Docket 4790, at 3-5.

The December order also provided:

2) failure to object to a monthly statement would not act as a waiver of any right to object to a final fee application;

3) all amounts paid to a professional under the order were interim and subject to review . . .

> 4) that when traveling, the professional would be allowed to bill 100% of their time if working on case matters that were detailed in the monthly statements and only 25% of their billable rate if no such work was performed.

Supra at 5-7.

No order expressly applied these procedures to investment bankers. However, Houlihan and the United States Trustee reached an agreement independently requiring Houlihan to comply with the July, 1991 order, which established a reporting procedure requiring filing detailed time records with the Court. *See* Houlihan Letter of December 6, 1991, responding to U.S. Trustee's Letter of Nov. 22, 1991, Exhibits C and D, Docket No. 17761. Houlihan agreed it would justify the reasonableness of its fees and expenses. Applicant expressly agreed to submit fee applications, which contained detailed descriptions of services in not greater than half hour increments as of November 1, 1991. Exhibit D, *supra*.

A final fee application on October 8, 1993, reported services rendered and expenses incurred from July, 1990 through April, 1993. Docket No. 15000. An amended final application of August 22, 1995, further detailed fee and expense requests. Docket No. 17969.

Debtor alleges Houlihan's time records and expenses do not support an allowance for fees or reimbursement of expenses. Most time entries are in one hour increments. Large time blocks are described with scarce detail, debtor complains. The Court agrees.

Debtor supports the objection by identifying specific time and expense entries, asserting these entries are contrary to both the U.S. Trustee agreement and the Code. Houlihan did not begin keeping time records until January, 1992. Applicant did not re-create time records before that date.

The final fee application does not include a breakdown of out-of-pocket expenses. Instead, it offers a two page summary of expenses incurred. The expense portion of the application is devoid of detailed descriptions and lacks supporting receipts or documentation.

Debtor notes Houlihan earlier provided certain receipts in prior interim applications and responded to discovery regarding expenses. However, debtor correctly asserts it is applicant's burden, not objector's, to prove the expenses are compensable.

Objector states that most time entries fail to give sufficient detail or descriptions of services or expenses. Debtor wants combined professional time, at conferences, meetings and Court hearings, stricken.

Finally, objector alleges unreasonable travel entries. Houlihan reports at least 400 hours in travel status. Such fees comprise approximately 10% of total hours billed. The July 1991 order limits the billing rate for travel, if no work is performed, to 25%. Houlihan billed 100% of its rate for travel. Applicant provides no indication the travel time spent was spent working on this case.

II

In its first amended fee application, Houlihan notes it was retained as the financial advisor to the bondholders' committee in July, 1990. Docket No. 17969, at 2. The retention, approved by the Court on September 19, 1990, contemplated a flat fee of $ 100,000 per month, plus reimbursement of expenses. Under this agreement, debtors could terminate Houlihan's employment with 30 days' notice. For the first six months following retention, Houlihan worked for both official committees. Subsequently, the unsecured creditors' committee retained separate professionals. Applicant was not terminated until after the effective date of the plan. *Id.*

On October 8, 1993, Houlihan filed its original fee application. Its first amended application was filed August 22, 1995. Docket No. 17969. From July, 1990 through April, 1993 (the application period), Houlihan says it provided professional services, at a flat monthly rate, in the sum of $3.3 million. Of that amount, Houlihan received interim compensation of $3 million. In addition, it incurred $207,699.35 in reimbursable out-of-pocket expenses. Interim reimbursement of $180,303.31 for expenses was paid. Docket No. 17969 at 2-3.

In summary, of the $3,507,699.35 in services rendered and costs incurred, Houlihan has been paid $3,180,393.31. The sum of $327,306.04 was held back pending final review and approval. *Supra* at 3.

Houlihan says it filed the amended fee application to supplement descriptions in the original application. It states

the amended application must be reviewed within the scope of the original retention arrangement, as modified by agreement with the United States Trustee and the standards of the code. *Id.* at 5.

Houlihan notes its original contract did not require maintenance of time records with the detail and specificity required of attorneys and accountants. The original retention was consistent with the customary practices of investment banking. Such firms typically charge a flat rate, payable monthly, as opposed to maintaining detailed time records, applicant maintains.

Houlihan reports the original retention was modified by agreement with the United States Trustee. The firm concedes it did not maintain time records in the required half hour increments. However, it submits the original and amended applications accomplish the desired result: sufficient detail to review the nature and extent of services rendered and costs incurred.

The fact more than one professional attended a meeting is not objectionable, given the complexity of the case, applicant argues. Under its engagement, it is paid a flat fee. If more than one professional is involved in a meeting, applicant is paid the same. Thus, debtor was not charged a greater amount for more than one professional.

Applicant says the inquiry should focus on whether the original terms of the retention agreement were improvident in light of developments not capable of being anticipated originally. This Court approved applicant's employment and fee in the original retention order. The Court necessarily

determined at that time that retention met section 330 standards. 11 U.S.C. § 330(a)(3). Accordingly, Houlihan suggests the present inquiry is limited to that question.

III

Applicant made an offer of judgment, arguing the final amended application and related exhibits provide sufficient detail to allow adequate review. Docket No. 18024, at 1-3. In the context of this offer, applicant requests the Court make a determination based upon debtor's pleadings. *Id.* at 3-4.

In making such a ruling, applicant believes the standard is whether the original terms of the retention were improvident in light of developments not capable of being anticipated originally. *Supra.*

Applicant notes that under the retention agreement it is entitled to recover its legal costs in obtaining approval and payment of fees. To facilitate resolution of the amended final application, applicant makes the following offer: Final approval of $3 million previously awarded as interim compensation; final approval of $180,393.31, previously awarded and paid in out-of-pocket expenses; disallowance of $300,000 sought for professional services; disallowance of $27,306.04 for out-of-pocket expenses incurred; waiver by applicant of all costs and attorneys' fees from Circle K. *Id.*

IV

In response, Circle K objected and moved to strike. Docket Nos. 18016-18018. Debtor argues the amended application remains fatally defective for five reasons:

1. Inadequate time accounting: There is little substantive change between the original and the amended fee applications.

2. Applicant shrugs off failure to honor the agreement with the United States Trustee with the cavalier assertion its narrative provides sufficient detail.

3. Debtor charges applicant failed to satisfy section 330 because of inadequate time records. It is impossible to determine whether the services were reasonable, actual or necessary. While applicant lauds its efforts to provide additional detail of the services rendered from 1990 through 1993, a noncontemporaneous narrative, without identification of the preparer's identity or qualifications, does not create a prima facie predicate of estate benefit.

4. No actual benefit was conferred. Nowhere in its amended description of tasks performed does applicant identify benefit to the estate. It is impossible to determine what actually was accomplished, debtor argues.

5. Applicant failed to present a prima facie showing. There is no actual or foundational basis to grant the request. An example is often illegible copies of receipts, without supporting declarations or affidavits. The accounting by

applicant for total expenses and supporting invoices is illegible.

Section 330 and Rule 2016(a) apply and require a detailed statement of services rendered, debtor urges. 11 U.S.C. § 330(a)(3); Rule 2016(a), Fed. Bankr. R.

Applicant's reliance on section 328 is misplaced, debtor argues. First, the original application in July, 1990 clearly states Houlihan will provide monthly invoices detailing services performed. All fees paid remain subject to Court approval in a final fee application. Applicant's final fee application of October, 1993 clearly states its request is made under sections 327 and 330. No mention is made of section 328 until debtor challenged the application.

The deference afforded applications by section 328 does not apply unless the appointment order expressly, unambiguously states specific terms and conditions are being approved. The retention order did not unconditionally approve employment terms. Instead, the Court approved terms subject to review and a final fee application. The order did not refer to section 328 and expressly reserved the right of the Court and all parties to review fees.

As an alternative, Circle K suggests if the Court is reluctant to strike the entire application, one-half of all fees should be denied as lacking substantiation. Applicant began employment in July, 1990. For fully one-half of the time employed, no record of services was maintained. The time records submitted begin in January, 1992, although applicant promised the United States Trustee to begin time recordation in November, 1991. Neither the Court nor debtor have anything to review, debtor argues.

V

The first issue is what standard governs: section 328(a) or section 330. 11 U.S.C. §§ 328(a), 330(a)(1).

Under section 328(a), a committee, with court approval, may employ a professional under section 327 or section 1103 on reasonable terms and conditions. Notwithstanding such terms and conditions, the court may allow different compensation, if the original conditions were improvident in light of developments not capable of being anticipated. *In re Circle K Corp.*, 165 Bankr. 653, 656 (Bankr. D. Ariz. 1994).

Where a bankruptcy court previously approved compensation terms, it cannot subsequently alter those terms unless the original terms were improvident in light of unanticipated developments. *Pitrat v. Reimers (In re Reimers)*, 972 F.2d 1127, 1128 (9th Cir. 1992).

Section 330(a) provides, after notice and hearing, and subject to sections 326, 328 and 329, the court may award a professional, reasonable compensation for actual, necessary services, based on their nature, extent and value, time spent, and costs of comparable services. 11 U.S.C. § 330(a)(1). Reimbursement for actual, necessary expenses is also allowed. 11 U.S.C. § 330(a)(1)(B).

These sections work in tandem. Section 330(a) provides the framework for review, expressly subject to the limitations of section 328(a). *In re Circle K*, *supra*, at 656.

The application to employ Houlihan is docketed as document 849. Houlihan was to receive $ 100,000 per month commencing July 12, 1990. The retention would last a minimum of three months. Houlihan agreed to provide debtors "with monthly invoices detailing services rendered. All fees so paid remain subject to subsequent Bankruptcy Court approval in a final fee application to be filed." Application at 4.

In addition to the monthly retainer, applicant would be reimbursed for expenses. This reimbursement also remains subject to Court approval in a final application. *Id.*

The retention agreement could be terminated at any time upon 30 days written notice. It is attached as Exhibit A to the application. The agreement is expressly subject to Court approval. Houlihan agreed its fees would be subject to the provisions of section 327, *et seq. Id.*

At a September 19, 1990 hearing, committee counsel indicated this employment application fell within the stipulation to retain professionals. The Court then approved the retention. All fees were subject to Court approval after submission of an appropriate application. Minute Entry of Sept. 9, 1990, Docket No. 1540.

The stipulation referenced in the September hearing is executed between debtor and the official committees. This agreement resulted in withdrawal of debtor's motion to merge the committees. Docket 1076.

In the stipulation, debtor acknowledged that each committee, subject to Court approval, could retain a financial

advisor. The committees acknowledged debtor had the right to object to the retention terms, including compensation. *Id.*, at 8.

The committees acknowledged there could be times when services of financial advisors were not essential. Each committee would use its best efforts to seek discrimination in the monthly fees paid its advisor, consistent with avoiding unnecessary work and costs. *Id.* at 9 and 10.

The order approving retention was entered on September 19, 1990. Docket 1544. In that order, debtor was authorized to pay applicant $100,000 per month and expenses, subject to judicial review of a final fee application, submitted on notice under relevant provisions of the Bankruptcy Code.

In some respects, the instant employment application is similar to the application construed in *In re Circle K Corp.*, *supra*.

In that case, an April 16, 1991 order expressly provided Salomon Brothers would be paid $100,000 per month and out-of-pocket expenses. This order provides the same.

In the Salomon dispute, the engagement letter and application were filed by stipulation between the committees and debtor, outlining rules for retention of financial advisors. It was at least implied that the financial advisor would receive monthly fees. It appeared the parties contemplated a flat fee arrangement for Salomon. 165 Bankr. at 656.

In this case, while the employment application was filed before the stipulation, the parties also appear to have contemplated a flat fee arrangement.

In the Salomon dispute, the retention order's language did not suggest the Court was requiring detailed time-keeping. That retention agreement and order did not specifically authorize employment with compensation and reimbursement fixed by further order. *Id. Cf. In re Gillett Holdings, Inc.*, 143 Bankr. 256, 259 (Bankr. D. Colo. 1992).

There are important differences between the Salomon application and the instant case, however. First, the Salomon application is expressly submitted pursuant to section 328. *In re Circle K Corp.*, *supra*, at 655. There is no such reference in the Houlihan application. Second, after the Court approved the retention application, Houlihan reached agreement with the United States Trustee on reporting requirements:

> Houlihan . . . will file with the Bankruptcy Court quarterly reports containing its professionals' time entries and summarizing how the services provided benefitted the estate. Houlihan . . . professionals will report their time in half-hour increments and provide detailed descriptions of the services performed. Expenses will be separately and thoroughly listed with copies of all receipts for travel expenses provided. Houlihan . . . has agreed to implement this reporting procedure as of November 1, 1991.

Houlihan Letter of Dec. 6, 1991, Docket No. 17761, at Exhibit D.

This letter agreement was in response to Justice Department concern over monitoring Houlihan's fees and expenses. There was "currently no way for our office to monitor your firm's fees and expenses..." U.S. Trustee Letter of November 22, 1991, Docket No. 17761, at Exhibit C.

There are two ways to examine the Houlihan retention agreement. First, if it meets the bare requirements of section 328(a), and highly detailed time entries are not required, the Court must still have a basis to determine Houlihan did the work.

Additionally, the Court should support the agreement between the U.S. Trustee and Houlihan. Houlihan specifically agreed to provide detailed monthly billing statements. This was to quiet concerns Houlihan was not aware (or bound by) the procedure authorized for all other professionals. The agreement insured Justice could monitor Houlihan's fees and expenses. Letter at Exhibit C, supra. Therefore, even if this is a flat fee retention, there is a later binding agreement to provide detailed billing.

Alternatively, a flat fee retention expressly subject to final court review can be viewed as a monthly retainer. 11 U.S.C. § 328(a). As noted in *U. S. Trustee v. Knudsen Corp. (In re Knudsen Corp.)*, 84 Bankr. 668, 671 (Bankr. 9th Cir. 1988), section 328(a) authorizes a retainer. A retainer contemplates payment of a lump sum at the beginning of the case or periodically thereafter. *Id.* Fees are not finally allowed, i.e., they are subject to disgorgement, until a

detailed final application is filed, noticed, an opportunity for objection and hearing is provided, and the court reviews and approves the application. *Id.*

This latter view conforms to the December, 1991 order that mandates filed monthly statements including a summary of time billed by project and a detailed description of services provided by each professional. There is a 20% hold-back provision and a final application requirement. Amended Order at Docket 5960. This is a classic Knudsen order. While it did not specifically apply to investment bankers, Houlihan consented to similar reporting procedures in its letter agreement of December 6, 1991.

Assuming this is a flat fee retention, the agreement with the U.S. Trustee, the requirement of a final application and the fact Houlihan's application specifically referenced section 330, all indicate applicant was, or should have been, aware of a duty to provide detailed fee information. Houlihan noted in its original final application that at the time of appointment, it "was not asked to account for its time, nor was (or is) it Houlihan Lokey's normal practice to maintain time records. However, pursuant to this Court's Order Approving Compensation and Reimbursement Procedure for Chapter 11 Professionals entered on June 18, 1991, as amended December 18, 1991, Houlihan Lokey agreed to maintain general time records with respect to professional time and tasks performed." Docket No. 15000, at 4.

In short, Houlihan admits that in its original fee application, filed under section 330, it promised to maintain time records. Actually, applicant agreed to do much more. It agreed to file quarterly reports, log time in half hour

increments and provide detailed descriptions of services performed. Finally, applicant agreed to separately, thoroughly list expenses. Letter Agreement at Exhibit D, supra. This was not done.

It is disingenuous to now assert section 328 applies and the Court can only examine whether the employment agreement was improvident. Regardless of whether section 328 applies, as in Salomon, or more realistically, whether section 330 applies, the Court must examine in detail the fee application based on the letter agreement.

In the present case, the detail provided is woefully short of that required by the U.S. Trustee and section 330(a). Professionals must maintain and present meticulously accurate time records of all services rendered to the estate as a necessary prerequisite to fee recovery. *In re Nucorp Energy, Inc.*, 764 F.2d 655, 658 (9th Cir. 1985). Detailed fee statements enable the bankruptcy court to fulfill its obligation to examine carefully requested compensation to justify an administrative expense. *Id.*

Here, there is insufficient detail to support such a large fee. There is a duplication between entries apparently prepared by Circle K and the entries prepared by Houlihan. The Court will accept objector's offer to grant one-half of the requested fees. Debtors will lodge and serve a proposed implementing order.

DATED this 17th day of January, 1996.

/s/_____
George B. Nielsen, Jr.
Chief U.S. Bankruptcy Judge

APPENDIX G

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

Chapter 11
Case Nos. 90-05052-PHX-GBN
to 90-05075-PHX-GBN

JOINTLY ADMINISTERED

[Filed July 24, 1990]

IN RE:	)
	)
The Circle K Corporation, CIRCLE K	)
CONVENIENCE STORES, INC., Circle	)
K Management Company, LAR-LIN, INC.,	)
FIRST CIRCLE PROPERTIES, INC.,	)
UtoteM, Inc., UtoteM MARKETS OF	)
ARIZONA, INC., U Totem of Alabama,	)
Inc., U-TOTE'M OF COLORADO INC.,	)
U-TOTE'M OF MIAMI, INC., TIC TOC	)
SYSTEMS, INC., MONTERRE	)
PROPERTIES, INC., SHOP & GO, INC.,	)
CIRCLE K GENERAL, INC., CIRCLE K	)
HAWAII, INC., COMBINED AVIATION	)
CO., Charter Marketing Company,	)
Charter Marketing Company	)
(Connecticut), MR. B'S OIL CO., INC.,	)
MR. B'S FOOD MART, INC., NPI	)

Corporation, OLD COLONY)
PETROLEUM COMPANY, INC.,)
New England Petroleum Distributions,)
Inc., and 44th Street & Camelback Limited)
Partnership,)
)
DEBTOR(S).)
)

APPLICATION FOR AUTHORITY TO RETAIN HOULIHAN, LOKEY, HOWARD & ZUKIN CAPITAL AS FINANCIAL ADVISOR TO THE OFFICIAL DEBENTUREHOLDERS COMMITTEE

TO HONORABLE GEORGE B. NIELSON, U.S. BANKRUPTCY JUDGE:

The application of the Official Debentureholders Committee (the "Committee") of Circle K Corporation and its subsidiaries and affiliates (the "Debtors") for authority to retain Houlihan, Lokey, Howard & Zukin Capital ("HLHZ"), as financial advisor to the Committee, respectfully represents:

1. On May 15, 1990 (the "Petition Date"), the Debtors filed a petition for reorganization under Chapter 11 of Title 11 of the United State Code (the "Bankruptcy Code"). The Debtors have been continued in possession of their assets and authorized to operate and manage their business as debtor-in-possession pursuant to §§1107 and 1108 of the Bankruptcy Code.

2. The Committee was constituted by the United States Trustee for the District of Arizona pursuant to a notice of appointment dated June 3, 1990.

3. By this application, the Committee seeks the entry an order authorizing the retention of HLHZ as financial advisor to the Committee.

4. The Committee respectfully submits that the services of a financial advisor are necessary to enable it to evaluate the complex financial and economic issues raised by the Debtors' reorganization proceedings and to fulfill its statutory and fiduciary duties to the creditors it represents. As part of this process, it will be necessary to (i) evaluate the principal assets and liabilities and the general financial condition of the Debtors, (ii) assess the future prospects of the various segments of the Debtors' business, (iii) evaluate the Debtors' subsidiaries and affiliates both on a going concern and liquidation basis, and (iv) evaluate and, if required, develop various alternative courses of action leading to an acceptable and reasonable plan of reorganization.

5. In searching for a financial advisor, the Committee conducted interviews with several investment banking firm, including HLHZ. As a result of HLHZ's broad experience in the reorganization process and expertise in pertinent fields, the Committee concluded that, of all candidates, HLHZ would best serve the interests of the Debentureholders. As such, on July 11, 1990 the Committee met in Dallas, Texas and selected HLHZ as its financial advisor.

6. The Committee now requests authority to enter into a letter agreement dated as of July 12, 1990 establishing the terms and conditions of HLHZ's engagement by the Committee (the "Retainer Agreement"). A copy of the Retainer Agreement is annexed hereto as Exhibit A.

7. HLHZ will assist the Committee in the performance of its duties in this case, including, although not necessarily limited to, the following matters:

(i) Assisting the Committee in reviewing, and providing them with an expert's understanding of, the Debtors' assets, liabilities, income subsidiaries operations and other aspects of the Debtors' financial affairs. In this regard it should be emphasized that the Debtors, in comparison to other companies, have a complex financial structure which would be difficult for a layman to interpret without expert assistance.

(ii) Assisting the Committee in evaluating and formulating positions with respect to case developments with financial implications to include, for example, any proposed sale of assets by the Debtors.

(iii) Assisting the Committee in its negotiations with the Debtors and other parties concerning the terms of any proposed plan of reorganization and the terms of new securities which may well be issued in connection therewith.

(iv) Assisting the Committee in its consideration of any proposed plan of

reorganization and in connection with all proceedings which may lead to confirmation of a plan.

8. In consideration for the financial advisory services which HLHZ will perform for the Committee, HLHZ will receive, commencing as of July 12, 1990, $100,000 per month, payable in advance with the first payment due upon the entry of the order authorizing the Committee to retain HLHZ and subsequent payments due on the 15th of each month. This retention shall be for a minimum term of three (3) months. HLHZ will provide the Debtors with monthly invoices detailing services rendered. All fees so paid remain subject to subsequent Bankruptcy Court approval in a final fee application to be submitted to the Court.

9. Additionally, HLHZ will be reimbursed by the Debtors, upon request from time to time, for all out-of-pocket expenses incurred in connection with services provided to the Committee pursuant to this Retainer Agreement, subject to the conditions on the retention of professionals as set forth in the Retainer Agreements. Reimbursement of expenses remains subject to subsequent Bankruptcy Court approval in a final fee application to be submitted to the Court.

10. The Retainer Agreement may be terminated by the Committee or HLHZ at any time upon 30 days prior written notice.

11. The Retainer Agreement also requires that the Debtors shall indemnify and hold harmless HLHZ against any and all losses, claims, damages or liabilities (or actions in respect thereof), including associated costs related to or

arising out of its engagement, except those resulting primarily from the willful misconduct, gross negligence or lack of good faith of HLHZ. It is the experience of the Committee that investment bankers require indemnification from the debtor as a condition of retention.

12. As of July 12, 1990, pending the Court's approval, HLHZ began providing services to the Committee. As HLHZ was providing services to the Committee in the period between July 12, 1990 and the date of this Application, and had, as of July 12, 1990, committed the resources needed for full participation upon the Debtors' approval, it is respectfully submitted that retention nunc pro tunc is warranted.

13. The Committee believes that HLHZ is a disinterested person and represents or holds no interest adverse to the interest of the estate with respect to the matters on which it is to be employed as indicated in the Declaration of Jeffrey I. Werbalowsky annexed hereto as Exhibit B.

14. No previous application for the relief requested herein has been made to this or any other Court.

WHEREFORE, it is respectfully requested that this Court enter the annexed order and grant such other and further relief as is just and proper.

Dated: July 24, 1990

ANDERSON KILL OLICK &
OSHINSKY, P.C.
Attorney for Official Committee
of Debentureholders of Circle
K Corporation

By: /s/_____
A Member of the Firm

EXHIBIT A

July 12, 1990 Via Facsimile and Federal Express

The Official Bondholder Committee
of The Circle K Corporation
Mr. Richard Vossler
Pacholder & Associates
The Spectrum Office Tower
11260 Chester Road
Suite 700
Cincinnati, Ohio 45246

Duncan Darrow, Esq.
Martin Brecker, Esq.
Mark Berner, Esq.
Anderson Kill Olick & Oshinsky, P.C.
666 Third Avenue
New York, New York 10017

Gentlemen:

The following shall constitute a retainer agreement ("Agreement" hereinafter) between the Official Bondholder Committee (the "Committee") of The Circle K Corporation (the "Company") and Houlihan, Lokey, Howard & Zukin Capital ("HLHZ") under which HLHZ shall provide such valuation, financial advisory, and investment banking services as the Committee may reasonably require in connection with the Company's Chapter 11 case. HLHZ shall assist the Committee in evaluating the asset and liabilities of the Company and its affiliates and in negotiations relating to any

proposed asset sales, financings, plans of reorganization and related issues, and undertake such other tasks as the Committee shall reasonably request in connection with the Committee's efforts in maximizing the returns to the Committee's constituencies in the Company's Chapter 11 case. It is further understood and accepted by HLHZ that it may be required to furnish judicial testimony, and otherwise advise the Committee in procedures concerning the substance of analyses performed in connection with this engagement, before the United States Bankruptcy Court (the "Court") before which the Company's Chapter 11 case is now pending.

The Committee agrees that the services and conclusions expressed by HLHZ in any form shall be based on methods and techniques that HLHZ considers appropriate under the circumstances. The Committee further agrees to assist HLHZ on a timely basis, in obtaining such information as HLHZ may reasonably require. In connection with this engagement, HLHZ shall execute a confidentiality agreement with the Company reasonably acceptable to HLHZ and the Committee.

HLHZ shall be paid by the Company a fee of $100,000 per month, commencing as of July 12, 1990 plus reasonable out-of-pocket expenses that may be incurred by HLHZ on the Committee's behalf. Monthly fees are payable in advance, with the first payment(s) due upon the Court's approval of this Agreement, with subsequent payments due upon the 15th of each month. Out-of-pocket expenses shall include, but not be limited to, all travel and lodging expenses, duplicating charges, computer charges, messenger services and long-distance telephone calls incurred by HLHZ on the Committee's behalf, provided that HLHZ shall endeavor to reasonably minimize such expenses. To the extent that

HLHZ, at the request of the Committee, procures financing for or sells assets of the Company and/or its affiliates. HLHZ shall be entitled to additional fees customarily charged for such services, to be negotiated in good faith with the Committee and subject to approval of the Court. This Agreement is terminable upon 30 days written notice by either party hereof, with a minimum term of 3 months.

As a condition to this Agreement, the Company will indemnify HLHZ in the form of Exhibit 1 hereto.

The obligations of HLHZ are solely corporate obligations, and no officer, director, employee, agent, shareholder or controlling person of HLHZ shall be subjected to any personal liability whatsoever to any person, nor will any such claim be asserted by or on behalf of any other party to this Agreement or any person relying on the services provided hereunder.

This Agreement is subject to the approval of the Court, which the Committee will promptly use its best efforts to obtain. HLHZ understands and agrees that the fees payable hereunder will be subject to the provisions of Section 327 *et seq.* of the Bankruptcy Code. Any disputes arising hereunder are subject to resolution by the Court. If any party to the Agreement brings an action based on the Agreement, the prevailing party shall be entitled to reasonable expenses therefor, including, but not limited to, attorney fees and expenses and court costs. This Agreement shall become effective as of July 12, 1990 upon order of the Court which order will bind the Company to the indemnification obligations attached as Exhibit 1 hereto. All of the obligations of the Company hereunder shall be binding upon a Chapter 7 or Chapter 11 Trustee.

THE OFFICIAL BONDHOLDER COMMITTEE
OF THE CIRCLE K CORPORATION

By: _____
Its: _____

HOULIHAN, LOKEY, HOWARD &
ZUKIN CAPITAL

/s/ _____
By: Jeffrey I. Werbalowsky
Its: Director, Financial Restructuring Group

Bankruptcy Court Application - 7/24/90

Exhibit 1

July 12, 1990

The Circle K Corporation
1601 North 7th Street
Phoenix, Arizona 85006

Gentlemen:

As a condition for the retention of Houlihan, Lokey, Howard & Zukin Capital ("HLHZ") on behalf of The Official Bondholder Committee of The Circle K Corporation (the "Company") per terms of our Retainer Agreement dated July 16, 1990 (the "Agreement"), you have agreed to the following effective as of the above date:

> If any party to the Agreement brings an action based on the Agreement, the prevailing party shall be entitled to reasonable expenses therefor, including, but not limited to, reasonable attorneys' fees and expenses and court costs. In addition, the Company agrees to indemnify, and hold HLHZ harmless against any losses, claims, damages or liabilities, joint or several, to which HLHZ directly or indirectly may become subject in connection with or arising out of the services which are the subject of the Agreement. The Company agrees to reimburse HLHZ for reasonable legal, investigation and preparation expenses or other expenses as incurred in connection with investigating or defending

against any loss, claim, damage or liability or any action, proceeding or investigation in respect thereof. However, the Company shall not be liable under the foregoing indemnity and reimbursement agreement to HLHZ in respect to any loss, claim, damage, liability or expense to the extent that a court having jurisdiction shall have determined by final judgement that such loss, claim, damage, liability or expense resulted from the gross negligence, willful misconduct or lack of good faith of HLHZ or any of its Affiliates and Controlling Persons (as defined below). The reimbursement and indemnity obligations of the Company under this paragraph shall be in addition to any liability the Company may otherwise have; shall extend upon the same terms and conditions to the shareholders, directors, officers, partners, employees, agents and controlling persons (if any) of HLHZ (all such persons being referred to collectively as "Affiliates and Controlling Persons"); and shall be binding upon and inure to the benefit of any successors, assigns, heirs and personal representatives of the Company and HLHZ. If the indemnification provided herein is unavailable to any indemnified party in respect to any loss, claim, damage, liability or expense, then each applicable indemnifying party, in lieu of indemnifying such indemnified party, shall contribute to the amount paid or payable by such indemnified party as a result of such loss, claim, damage, liability or

expense in such proportion as is appropriate to reflect not only relative benefits received by the Company on the one hand, and HLHZ on the other hand, but also the relative fault of the Company on the one hand, and HLHZ on the other hand, as well as any other relevant equitable considerations. Notwithstanding the foregoing, HLHZ shall not be obligated to contribute any amount hereunder that exceeds the amount of fees or other benefits previously received pursuant to this Agreement. The provisions of this paragraph shall survive any termination of this Agreement.

HOULIHAN, LOKEY, HOWARD & ZUKIN CAPITAL

/s/ _____
Jeffrey I. Werbalowsky
Director
Financial Restructuring Group

Acknowledged and Agreed:

THE CIRCLE K CORPORATION

By: _____
Its: _____

Bankruptcy Court Application - 7/24/90

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

Chapter 11

Case Nos: 90-5052 PHX-GBN
to 90-5075 PHX-GBN

[Filed July 17, 1990]

JOINTLY ADMINISTERED

IN RE:	)
	)
THE CIRCLE K CORPORATION	)
et al.	)
Debtors.	)
	)

DECLARATION OF JEFFREY I. WERBALOWSKY IN SUPPORT OF APPLICATION TO EMPLOY INVESTMENT BANKER

I, Jeffrey I. Werbalowsky, respectfully represent as follows:

1. I am the Director of the Financial Restructuring Group of Houlihan, Lokey, Howard & Zukin Capital ("HLHZ"), a California limited partnership which is a registered broker dealer, and which provides investment banking and financial advisory services.

2. HLHZ is an affiliate of the firm of Houlihan, Lokey, Howard & Zukin, Inc. ("Houlihan"), a national valuation and financial advisory firm with offices in Los Angeles, San Francisco, Chicago and New York.

3. Our Financial Restructuring Group provides a range of financial advisory, investment banking, and valuation services to debtors and debtors-in-possession, trustees, committees, acquirors, and other parties in interest in connection with bankruptcy and financially distressed situations. Professionals from Houlihan sometimes provide assistance in HLHZ's restructuring engagements. Professionals in HLHZ have been involved in numerous bankruptcy and distressed situations from a variety of perspectives.

4. HLHZ has agreed to provide a range of financial advisory and investment banking services to the Official Committee of Bondholders (the "Committee") in the Circle K Corporation Chapter 11 case before this Court pursuant to the terms and conditions of the retainer agreement which is attached hereto.

5. Both HLHZ and Houlihan have thousands of clients with which they have recently worked or are presently working, which are located throughout the country in variety of industries. It is possible that some of these past or present clients may have some connection to, or be creditors or shareholders of, the Debtor. Other than as so provided, to the best of my knowledge, neither HLHZ nor Houlihan has any professional connection to the Debtor; neither HLHZ nor Houlihan has any interest adverse to the Debtor; and neither HLHZ nor Houlihan has any interests which would in any

way interfere with their performance of the services to be provided hereby.

6. We currently anticipate that in addition to myself, O. Kit Lokey, Donald V. Smith, Irwin N. Gold, Matthew S. Barrett, Cary S. Stanford, Leslie J. Meltzer and Michael A. Kramer, will be primarily working on this engagement. Attached hereto are biographies of the senior professionals who will staff this engagement.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 17th day of July 1990 at Los Angeles, California.

HOULIHAN, LOKEY, HOWARD & ZUKIN CAPITAL

By: /s/_____
Jeffrey I. Werbalowsky
Director, Financial Restructuring Group

ATTACHMENT

BIOGRAPHIES

O. Kit Lokey is a managing director and president of Houlihan, Lokey, Howard & Zukin, Inc. He has participated in more than 1,000 valuation and financial advisory engagements, covering a wide range of industries. Mr. Lokey lectures frequently and has testified in various state and federal courts and before the California Corporations Commissioner as an expert witness in the areas of capital stock and business enterprise appraisals, the reasonableness of executive compensation, monetary damages, and other related areas of business management and operations. He received a B.S. in Engineering and an M.B.A. from the University of California, Los Angeles. A Certified Public Accountant in California, Mr. Lokey is a member of the American Institute of Certified Public Accountants, where he serves on the Litigation Services Committee. He is a senior member of the American Society of Appraisers, serving on its Business Valuation Committee, and is Co-Chairman of the Valuation Advisory Committee of the ESOP Association. Mr. Lokey's clients include many of the largest companies, both public and private, in the United States. In addition, he has provided financial advice, including fairness opinions, securities design and evaluation, and financial structuring in more than 75 leveraged buyouts, of both public and private companies.

Donald V. Smith earned a B.S. in engineering from the U.S. Naval Academy and an M.B.A. from the University of Pennsylvania Wharton School of Business. Don is a managing director in charge of HLHZ's New York office and has been involved in investment banking, business valuation and

financial restructuring for the past seventeen years. Prior to joining HLHZ, Don headed reorganization and valuation services for Morgan Stanley & Co., Incorporated, where he spent ten years in the corporate finance department. Previously, he was a senior officer in charge of the New York office and then the Southern division of a major valuation firm. In the reorganization area, Don advised Manville Corporation in its successful Chapter 11 reorganization, the secured bank lenders in the Allegheny International bankruptcy and the Equity Committee in the A.H. Robins bankruptcy. In addition, he has represented parties involved in the out-of-court workout, sale and acquisition of troubled companies. Mr. Smith has provided solvency and valuation analysis and opinions in numerous leveraged transactions. He has testified in a variety, of national and international courts concerning complex valuation issues including the valuation of St. Joe Paper Company in 1982 (Florida State Court), in 1984, 1985 and 1986 before the International Court at the Hague concerning the value of Dupont's Iranian textile operations, Amoco's Kharg Island petrochemical plant, and Amoco's Persian Gulf oil operations; and in 1989 through written declaration in Federal District Court concerning the fairness of Amanda's acquisition offer for Universal Foods corporation. Don just completed an engagement as expert witness in Ontario State Court in connection with valuation issues in Kruger, Inc.'s dividend policies, and is presently the expert witness for the secured creditors committee in the Allegheny International Chapter 11 case.

Jeffrey I. Werbalowski earned a B.A. in Economics from the University of Virginia in 1979, and a J.D. from Columbia University of 1982. He was associated with Gibson, Dunn & Crutcher in their bankruptcy practice group from 1982

through 1985 and with Levene & Eisenberg, specializing exclusively in bankruptcy and corporate reorganization from 1985 to 1987. As a lawyer, Mr. Werbalowsky represented publicly and privately held debtors, as well as creditors committees, equity committees, acquirers and secured creditors and was involved in Knudsen, Wickes, H.R.T. Zody's and Smith International. In 1987 he left the law to become chief executive officer of Cheviot Capital Corporation, an investment firm engaged in transactions involving bankruptcy and distressed situations. Cheviot Capital was purchased by Houlihan, Lokey, Howard & Zukin Capital in 1988, at which time he assumed his present position as national director of Houlihan, Lokey, Howard & Zukin's Financial Restructuring Group, providing financial advisory and investment banking services to debtors, bondholders and creditor committees and the various parties in interest in out-of-court and Chapter 11 restructurings. Mr. Werbalowsky belongs to a variety of organizations relating to bankruptcy and reorganization, and is on the editorial board of the California Bankruptcy Journal.

Irwin N. Gold earned a B.A. in Economics, *summa cum laude*, from Duke University in 1979, and a J.D. from the University of Virginia School of Law in 1982. He was associated with Gibson, Dunn & Crutcher from 1982 through 1985 as a member of the firm's corporate department. Mr. Gold was vice president and director of corporate finance of Wood Bros. Homes, Inc., a Denver-based $300 million real estate and mortgage banking company, from 1985 to 1986, where he helped negotiate a workout and sale of the company. He was a principal of The Seneca Group, an investment banking and financial advisory firm, from 1986 to 1988. In 1988, Mr. Gold became Associate Director of the HLHZ

Financial Restructuring Group and is Director of the firm's Los Angeles Financial Restructuring Group. Mr. Gold is currently advising the Creditors Committees in the Care Enterprises, Qintex Entertainment, and Northview Corporation Chapter 11 cases, and various parties in out-of-court restructurings. Mr. Gold is a member of a variety of organizations including the Financial Lawyers Conference, the Bankruptcy Study Group and the American Bankruptcy Institute.

Matthew S. Barrett earned a B.A. in Operations Research, cum laude, from Revelle College at the University of California at San Diego, and an M.B.A. from the University of California at Los Angeles. Mr. Barrett is a vice president at Houlihan, Lokey, Howard & Zukin Inc. and serves as project manager on engagements where he is responsible for the valuation of closely held securities. Mr. Barrett teaches the course on business valuation provided by the California Society of Certified Public Accountants.

Cary J. Stanford earned his B.A. from the University of California and an M.B.A. from U.C.L.A. in 1983. Mr. Stanford was a consultant with Kaplan Smith from 1983 to 1985 where he rendered valuation opinions for savings and loan associations with initial public offerings, and devised asset restructuring plans for both healthy and insolvent thrifts. Clients included Commercial Savings and Loan, Glendale Federal Savings and Loan, and Columbia First Federal. Mr. Stanford was manager of the Los Angeles office of Banking Decision Systems from 1985 to 1988 where he directed the asset/liability management consulting practice and applied advanced quantitative analysis to enhance risk-adjusted portfolio returns. Clients included Washington Mutual FS &

LA, Silverado Savings, Security Pacific National Bank, and the Benj. Franklin Savings and Loan. Mr. Stanford became a member of the HLHZ Financial Restructuring Group in 1988 where he specializes in distressed financial institutions.

A COPY OF THE FOREGOING WAS SERVED ON THE FOLLOWING PERSONS BY FIRST CLASS MAIL, POSTAGE FULLY PREPAID, THIS 24th DAY OF JULY, 1990:

Counsel for Debtor
D.J. Baker, Esq.
Rosalie Walker Gray, Esq.
Weil, Gotshal & Manges
700 Louisiana, Suite 1600
Houston, Texas 77002

John G. Dawson, Esq.
Streich, Lang, Weeks & Cardon
2100 First Interstate Bank Plaza
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APPENDIX H

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

Chapter 11
Case Nos. 90-05052-PHX-GBN
to 90-05075-PHX-GBN

JOINTLY ADMINISTERED

[Filed September 19, 1990]

IN RE:	)
	)
The Circle K Corporation, CIRCLE K	)
CONVENIENCE STORES, INC., Circle	)
K Management Company, LAR-LIN, INC.,	)
FIRST CIRCLE PROPERTIES, INC.,	)
UtoteM, Inc., UtoteM MARKETS OF	)
ARIZONA, INC., U Totem of Alabama,	)
Inc., U-TOTE'M OF COLORADO INC.,	)
U-TOTE'M OF MIAMI, INC., TIC TOC	)
SYSTEMS, INC., MONTERRE	)
PROPERTIES, INC., SHOP & GO, INC.,	)
CIRCLE K GENERAL, INC., CIRCLE K	)
HAWAII, INC., COMBINED AVIATION	)
CO., Charter Marketing Company,	)
Charter Marketing Company	)
(Connecticut), MR. B'S OIL CO., INC.,	)
MR. B'S FOOD MART, INC., NPI	)

Corporation, OLD COLONY)
PETROLEUM COMPANY, INC.,)
New England Petroleum Distributions,)
Inc., and 44th Street & Camelback Limited)
Partnership,)
)
DEBTOR(S).)
_____)

ORDER AUTHORIZING RETENTION HOULIHAN, LOKEY, HOWARD & ZUKIN CAPITAL AS FINANCIAL ADVISOR TO THE OFFICIAL COMMITTEE OF DEBENTURE-HOLDERS.

Upon the annexed Application of The Official Committee of Debentureholders (the "Committee") dated July ____, 1990, seeking authorization to retain and employ the firm of Houlihan, Lokey, Howard & Zukin Capital ("HLHZ"), as financial advisor for the purposes set forth in the Application annexed thereto, and the Court being satisfied that HLHZ represents no interest adverse to the Debtors, the creditors, or the estates with respect to the matters upon which it is to be engaged, that HLHZ and its professional personnel are disinterested persons within the meaning of Section 101(13) of the Bankruptcy Code, that the employment of HLHZ is necessary and in the best interests of the Debtors, the creditors and the estates, and sufficient cause appearing therefore and due notice haven been given;

IT IS HEREBY ORDERED that the Committee be, and is hereby authorized and empowered to retain HLHZ, nunc pro tunc to July 12, 1990, to perform those services set forth in the Application and the Retainer Agreement; and

IT IS FURTHER ORDERED that the Debtors are authorized to pay HLHZ the amount of $100,000 per month and reimburse expenses as set forth in the Application and Retainer Agreement subject to review by the court in a final fee application to be submitted by HLHZ on notice pursuant to relevant provisions of the Bankruptcy Code.

Dated: Phoenix, Arizona
September 19, 1990

/s/ _____
United States Bankruptcy Judge

APPENDIX I

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

Chapter 11
Case Nos. 90-05052-PHX-GBN
to 90-05075-PHX-GBN

JOINTLY ADMINISTERED

[Filed December 18, 1991]

IN RE:	)
	)
The Circle K Corporation, CIRCLE K	)
CONVENIENCE STORES, INC., Circle	)
K Management Company, LAR-LIN, INC.,	)
FIRST CIRCLE PROPERTIES, INC.,	)
UtoteM, Inc., UtoteM MARKETS OF	)
ARIZONA, INC., U Totem of Alabama,	)
Inc., U-TOTE'M OF COLORADO INC.,	)
U-TOTE'M OF MIAMI, INC., TIC TOC	)
SYSTEMS, INC., MONTERRE	)
PROPERTIES, INC., SHOP & GO, INC.,	)
CIRCLE K GENERAL, INC., CIRCLE K	)
HAWAII, INC., COMBINED AVIATION	)
CO., Charter Marketing Company,	)
Charter Marketing Company	)
(Connecticut), MR. B'S OIL CO., INC.,	)
MR. B'S FOOD MART, INC., NPI	)

Corporation, OLD COLONY)
PETROLEUM COMPANY, INC.,)
New England Petroleum Distributors,)
Inc., and 44th Street & Camelback Limited)
Partnership,)
)
DEBTORS.)
)

AMENDED ORDER APPROVING COMPENSATION AND REIMBURSEMENT PROCEDURE FOR CHAPTER 11 PROFESSIONALS AND ALLOWING COMPENSATION AND REIMBURSEMENT FOR COMMITTEE PROFESSIONALS PURSUANT TO THIRD INTERIM APPLICATIONS

A hearing having been held on August 21, 1991, on the Motion for, and, Memorandum in Support of, Order Approving Modification and Supplementation of Interim Compensation and Reimbursement Procedure for Chapter 11 Professionals and Authorizing Debtors to Hold Back Fees From Second Interim Fee Applications (the "Debtors' Motion"), filed by The Circle K Corporation and its affiliates in the above-captioned chapter 11 cases (the "Debtors"); an oral motion having been made at the hearing by Anderson, Kill, Olick & Oshinsky, counsel for the official Debenture Holders' Committee, (the "AKOO Motion") seeking elimination of interim fee applications; and third interim applications for interim compensation and reimbursement having been filed on August 15, 1991, by the professionals retained by the Official Committee in these cases (the "Committee Applications") and a hearing on the Committee Applications having been held November 13, 1991; and the Court having considered the Debtors' Motion, the AKOO Motion and the Committee Applications, and having heard the

argument of counsel for the United States Trustee, the Debtors, and the Official Committees at the hearings; it appearing to the Court that the proposed form of this amended order ("Amended Order") has been properly served upon the necessary parties in interest; it further appearing to the Court that modification and supplementation of the interim compensation and reimbursement procedure for chapter 11 professionals (the "Procedure"), which was approved by this Court's order dated June 18, 1991 (the "Procedure Order"), is necessary to provide (i) for hold-back of 20% of all fees of the chapter 11 professionals until final fee applications are approved, which hold-back will begin with fees earned after February 1, 1991, (ii) for the reservation of objections to all of the fees earned and expenses incurred by a professional from its retention in these cases until the objection deadline set in connection with a final fee application of such professional, and (iii) for mechanical adjustments to the Procedure to eliminate the requirement for interim fee applications by the professionals; it further appearing that such modifications and supplementation are in accordance with sections 330 and 331, title 11, of the United States Code; it further appearing to the Court that the Debtors, the Unsecured Creditors' Committee and the Debenture Holders' Committee support entry of this Amended Order; based upon the foregoing, and upon the findings of fact and conclusions of law placed on the record at the August 21, 1991 hearing and November 13, 1991 hearing, the Court having determined that the relief requested by the Debtors' Motion, the AKOO Motion and the Committee Applications is in the best interest of the Debtors' chapter 11 estates; now, therefore, it is hereby

ORDERED that effective August 21, 1991, the Procedure Order is amended and superseded by this Amended Order; it is hereby further

ORDERED that the procedure set forth in this Amended Order shall govern the payment of compensation for services rendered and reimbursement for expenses incurred by the examiner appointed in these cases and the professionals (except investment bankers, who will be governed by a separate order) retained by the Debtors, the Official Committees, and the examiner with respect to these chapter 11 cases (collectively, the "Professionals"); it is hereby further

ORDERED that within sixty days after the end of each calendar month, commencing with the month of May 1991 or the month of a Professional's retention if later, monthly statements for services rendered and expenses incurred (the "Monthly Statements") shall be submitted by each Professional to the Court, the Debtors, and counsel for the Debtors, the United States Trustee, the Unsecured Creditors' Committee, the Debenture Holders' Committee, the Senior Secured Noteholders, and the Bank Group; it is hereby further

ORDERED that Monthly Statements shall be sufficient support interim compensation and reimbursement to the Professionals; preliminary or draft statements are not acceptable forms for Monthly Statements. Specifically, a Monthly Statement shall consist of a case-captioned cover sheet signed by the Professional with the following attachments: (1) a summary of the total fees earned and expenses incurred by the Professional during that calendar

month and the total requested payment (less a 20% hold back of fees); (2) a list of billing rates for each professional rendering services; (3) a summary of the time billed to each project during the calendar month by each individual; (4) a detailed description of the services rendered by each individual during the calendar month categorized by project and day, with the time an individual spent on each discrete task specified; (5) an itemized list of expenses incurred during the calendar month and back up receipts for lodging, air and meal expenses (all other receipts for expenses in excess of $30.00 shall be available for review upon written request by any party in interest); and (6) a brief progress report outlining key projects involving significant time and expense by the Professional during the calendar month; it is hereby further

ORDERED that within thirty days after service of the Monthly Statement ("Objection Period"), objections to the Monthly Statement must be filed with the Court and served on the Professional whose Monthly Statement is subject to the Objection, on the Debtors, and on counsel for the Debtors, the United States Trustee, the Unsecured Creditors' Committee, the Debenture Holders' Committee, the Senior Secured Noteholders, and the Bank Group; it is hereby further

ORDERED that failure to object to a Monthly Statement shall not operate as a waiver of any right to object to any application for final allowance of fees or expenses and that the right of any party in interest, including the Debtors, is reserved without any waiver or prejudice to assert any objections with respect to any of the fees earned and expenses incurred by a Professional from its retention in these cases until the objection deadline set in connection with the final

application for fees and expenses by such Professional; it is further

ORDERED that after the expiration of the Objection Period, the Debtors shall promptly pay the Professional based upon the Professional's Monthly Statement without the necessity of prior Court approval; provided, however, that the Debtors shall hold back 20% of all fees earned after February 1, 1991; and further, provided, however, that the Debtors shall not make any payment to a Professional for any amounts objected to during the Objection Period that exceed the 20% held back; it is hereby further

ORDERED that if an objection to a Monthly Statement is filed, the Professional to whose Monthly Statement such objection is directed shall request a hearing and provide notice of the hearing to counsel for the United States Trustee, the Debtors, the Unsecured Creditors' Committee, the Debenture Holders' Committee, the Senior Secured Noteholders, and the Bank Group; it is hereby further

ORDERED that all amounts paid to a Professional on a monthly basis pursuant to this Amended Order and the Monthly Statements required therein are interim and not final and will be subject to review and possible disgorgement in connection with such Professional's final fee application; it is hereby further

ORDERED that final fee applications will be subject to notice and hearing as provided in the Bankruptcy Code and Rules and must comply in every respect with the Bankruptcy Code, Bankruptcy Rules, and the Local Bankruptcy Rules for the District of Arizona; it is hereby further

ORDERED that when traveling, the Professionals are allowed to bill for 100% or their time if working on case matters that are detailed in the Monthly Statements and 25% of their billable rate if no work is performed; it is hereby further

ORDERED that reasonable time and expenses spent preparing Monthly Statements, interim fee applications, if any, and final fee applications are reimbursable from the Debtors' estates; it is hereby further

ORDERED that any changes in any Professional's billing rates must be separately noticed to the Court, the Debtors, and counsel for the United States Trustee, the Debtors, the Unsecured Creditors' Committee, the Debenture Holders' Committee, the Senior Secured Noteholders, and the Bank Group; it is hereby further

ORDERED that this Order shall apply only to the Professionals and shall not apply to non-chapter 11 professional retained pursuant to the Agreed Order Authorizing Procedure for Employment and Compensation of Professionals Utilized by Debtors in the Ordinary Course of Business; it is hereby further

ORDERED that if the Debtors, the Official Committees, or the examiner seek to employ additional professionals after the date of this Order to provide services during the pendency of these cases, this Amended Order shall apply to such professionals only if expressly provided for in the order approving the retention of such professionals; it is hereby further

ORDERED that any monthly payments made pursuant to this Amended Order with cash collateral shall be made only in accordance with the Stipulation for Use of Cash Collateral and for Adequate Protection as such has been amended and approved by this Court; and it is hereby further

ORDERED that pursuant to the Committee Applications, the Professionals retained by the Official Committees in these cases be allowed interim compensation for 80% of the fees earned and reimbursement for 100% of the expenses incurred during the period of the Committee Applications as follows:

Cleary, Gottlieb, Steen & Hamilton	$650,146.20
Anderson, Kill, Olick & Oshinsky, P.C.	633,342.32
Johnson, Maynard, Grant & Parker	64,401.49
Price Waterhouse	710,403.60

that the Debtors are authorized to pay the above Professionals the above amounts within ten days of the date of entry of this Order (unless any of such amounts have been previously paid pursuant to separate order of this Court); that the allowance of interim compensation and reimbursement pursuant to the Committee Applications is interim and the right of any party in interest, including the Debtors, is reserved without any waiver or prejudice to assert any objections with respect to any of such allowed interim compensation and reimbursement

until the objection deadline set in connection with the final application for fees and expenses by such Professional.

DATED this 18th day of December, 1991.

/s/ _____
THE HONORABLE GEORGE B. NIELSEN
United States Bankruptcy Judge

APPENDIX J

TITLE 11. BANKRUPTCY
CHAPTER 3. CASE ADMINISTRATION
SUBCHAPTER II. OFFICERS
11 USCS § 1103(a) (2002)

§ 1103. Powers and duties of committees.

(a) At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.

TITLE 11. BANKRUPTCY
CHAPTER 3. CASE ADMINISTRATION
SUBCHAPTER II. OFFICERS
11 USCS § 328 (2002)

§ 328. Limitation on compensation of professional persons

(a) The trustee, or a committee appointed under section 1102 of this title [11 USCS § 1102], with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title [11 USCS § 327 or 1103], as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

(b) If the court has authorized a trustee to serve as an attorney or accountant for the estate under section 327(d) of this title [11 USCS § 327(d)], the court may allow compensation for the trustee's services as such attorney or accountant only to the extent that the trustee performed services as attorney or accountant for the estate and not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney or accountant for the estate.

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title [11 USCS § 327(c), 327(e), or 1107(b)], the court

may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title [11 USCS § 327 or 1103] if, at any time during such professional person's employment under section 327 or 1103 of this title [11 USCS § 327 or 1103], such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

TITLE 11. BANKRUPTCY
CHAPTER 3. CASE ADMINISTRATION
SUBCHAPTER II. OFFICERS
11 USCS § 330 (2002)

§ 330. Compensation of officers

(a) (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103--

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) (A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title [11 USCS §§ 101 *et seq.*];

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title [11 USCS §§ 101 *et seq.*].

(4) (A) Except as provided in subparagraph (B), the court shall not allow compensation for--

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(b) (1) There shall be paid from the filing fee in a case under chapter 7 of this title [11 USCS §§ 701 *et seq.*] $45 to the trustee serving in such case, after such trustee's services are rendered.

(2) The Judicial Conference of the United States--

(A) shall prescribe additional fees of the same kind as prescribed under section 1914(b) of title 28; and

(B) may prescribe notice of appearance fees and fees charged against distributions in cases under this title [11 USCS §§ 101 *et seq.*]; to pay $15 to trustees serving in cases after such trustees' services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994 [enacted Oct. 22, 1994], such $15 shall be paid in addition to the amount paid under paragraph (1).

(c) Unless the court orders otherwise, in a case under chapter 12 or 13 of this title, the compensation paid to the trustee serving in the case shall not be less than $5 per month from any distribution under the plan during the administration of the plan.

(d) In a case in which the United States trustee serves as trustee, the compensation of the trustee under this section shall be paid to the clerk of the bankruptcy court and deposited by the clerk into the United States Trustee System Fund established by section 589a of title 28.

APPENDIX K

Legislative History to Section 328

This section, which is parallel to section 326, fixes the maximum compensation allowable to a professional person employed under section 327. It authorizes the trustee, with the court's approval, to employ professional persons on any reasonable terms, including on a retainer, on an hourly, or on a contingent fee basis. Subsection (a) further permits the court to allow compensation different from the compensation provided under the trustee's agreement if the prior agreement proves to have been improvident in light of developments unanticipatable at the time of the agreement. The court's power includes the power to increase as well as decrease the agreed upon compensation. This provision is permissive, not mandatory, and should not be used by the court if to do so would violate the code of ethics of the professional involved, such as an accountant.

Subsection (b) limits a trustee that has been authorized to serve as his own counsel to only one fee for each service. The purpose of permitting the trustee to serve as his own counsel is to reduce costs. It is not included to provide the trustee with a bonus by permitting him to receive two fees for the same service or to avoid the maxima fixed in section 326. Thus, this subsection requires the court to differentiate between the trustee's services as trustee, and his services as trustee's counsel, and to fix compensation accordingly. Services that a trustee normally performs for an estate without assistance of counsel are to be compensated under the limits fixed in section 326. Only services that he performs that are normally

performed by trustee's counsel may be compensated under the maxima imposed by this section.

Subsection (c) permits the court to deny compensation for services and reimbursement of expenses if the professional person is not disinterested or if he represents or holds an interest adverse to the estate on the matter on which he is employed. The subsection provides a penalty for conflicts of interest.

[*House Report No. 95-595, 95th Cong., 1st Sess. 328-329 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 39 (1978).*]

Section 328(c) adopts a technical amendment contained in the Senate amendment indicating that an attorney for the debtor in possession is not disqualified for compensation for services and reimbursement of expenses simply because of prior representation of the debtor.

[*124 Cong.* Rec. *H 11,091 (Sept. 28, 1978); S 17,408 (Oct. 6, 1978).*]

Legislative History to Section 330

Section 330 authorizes compensation for services and reimbursement of expenses of officers of the estate. It also prescribes the standards on which the amount of compensation is to be determined. As noted above, the compensation allowable under this section is subject to the maxima set out in sections 326, 328, and 329. The compensation is to be reasonable, for actual necessary services rendered, based on the time, the nature, the extent, and the value of the services rendered, and on the cost of comparable services other than in a case under the bankruptcy code. The effect of the last provision is to overrule *In re Beverly Crest Convalescent Hospital, Inc.*, 548 F.2d 817 (9th Cir. 1976, as amended 1977), which set an arbitrary limit on fees payable, based on the amount of a district judge's salary, and other, similar cases that require fees to be determined based on notions of conservation of the estate and economy of administration. If that case were allowed to stand, attorneys that could earn much higher incomes in other fields would leave the bankruptcy arena. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service. Bankruptcy fees that are lower than fees in other areas of the legal profession may operate properly when the attorneys appearing in bankruptcy cases do so intermittently, because a low fee in a small segment of a practice can be absorbed by other work. Bankruptcy specialists, however, if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field.

This subsection provides for reimbursement of actual, necessary expenses. It further provides for compensation of paraprofessionals employed by professional persons employed by the estate of the debtor. The provision is included to reduce the cost of administering bankruptcy cases. In nonbankruptcy areas, attorneys are able to charge for a paraprofessional's time on an hourly basis, and not include it in overhead. If a similar practice does not pertain in bankruptcy cases, then the attorney will be less inclined to use paraprofessionals even where the work involved could easily be handled by an attorney's assistant, at much lower cost to the estate. This provision is designed to encourage attorneys to use paraprofessional assistance where possible, and to ensure that the estate, not the attorney, will bear the cost, to the benefit of both the estate and the attorneys involved.

Subsection (b) specifies that in a case in which the United States trustee serves as trustee, the compensation to which he is entitled is to be paid into the Treasury. These fees will help defray the cost of the United States trustee system.

[*House Report No. 95-595, 95th Cong., 1st Sess. 329-30 (1977).*]

Subdivision (b) as enacted provides for $20 to be paid the trustee from the filing fee.

Section 330 authorizes the court to award compensation for services and reimbursement of expenses of officers of the estate, and other professionals. The compensation is to be reasonable, for economy in administration is the basic objective. Compensation is to be for actual necessary services, based on the time spent, the nature, the extent and the value of the services rendered, and the cost of comparable services in nonbankruptcy cases. There are the criteria that

have been applied by the courts as analytic aids in defining "reasonable" compensation.

The reference to "the cost of comparable services" in a nonbankruptcy case is not intended as a change of existing law. In a bankruptcy case fees are not a matter for private agreement. There is inherent a "public interest" that "must be considered in awarding fees." *Massachusetts Mutual Life Insurance Co. v. Brock*, 405 F. 2d 429, 432 (C.A. 5, 1968), *cert. denied*, 395 U.S. 906 (1969). An allowance is the result of a balance struck between moderation in the interest of the estate and its security holders and the need to be "generous enough to encourage" lawyers and others to render the necessary and exacting services that bankruptcy cases often require. *In re Yale Express System, Inc.*, 366 F. Supp. 1376, 1381 (S.D.N.Y. 1973). *See also In re Delta Food Processing Corp.*, 374 F. Supp. 76, 82 (N.D. Miss. 1974). *Brock, supra; In re Bemporad Carpet Mills, Inc.*, 434 F. 2d 988,989-90 (C.A. 5, 1970). The rates for similar kinds of services in private employment is one element, among others, in that balance. Compensation in private employment noted in subsection (a) is a point of reference, not a controlling determinant of what shall be allowed in bankruptcy cases.

One of the major reforms in 1938, especially for reorganization cases, was centralized control over fees in the bankruptcy courts. *See Brown v. Gerdes*, 321 U.S. 178, 182-184 (1944); *Leiman v. Guttman*, 336 U.S. 1, 4-9 (1949). It was intended to guard against recurrence of "the many sordid chapters" in "the history of fees in corporate reorganizations." *Dickinson Industrial Site, Inc. v. Cowan*, 309 U.S. 382, 388 (1940). In the years since then the bankruptcy bar has flourished and prospered, and persons of merit and quality have not eschewed public service in bankruptcy cases merely because bankruptcy courts, in the

interests of economy in administration, have not allowed them compensation that may be earned in the private economy of business or the professions. There is no reason to believe that, in generations to come, their successors will be less persuaded by the need to serve in the public interest because of stronger allures of private gain elsewhere.

Subsection (a) provides for compensation of paraprofessionals in order to reduce the cost of administering bankruptcy cases. Paraprofessionals can be employed to perform duties which do not require the full range of skills of a qualified professional. Some courts have not hesitated to recognize paraprofessional services as compensable under existing law. An explicit provision to that effect is useful and constructive.

The last sentence of subsection (a) provides that in the case of a public company--defined in section 1101(3)--the court shall refer, after a hearing, all applications to the Securities and Exchange Commission for a report, which shall be advisory only. In chapter X cases in which the Commission has appeared, it generally filed reports on fee applications. Usually, courts have accorded the SEC's views substantial weight, as representing the opinion of a disinterested agency skilled and experienced in reorganization affairs. The last sentence intends for the advisory assistance of the Commission to be sought only in case of a public company in reorganization under chapter 11.

Subsection (b) reenacts section 249 of chapter X of the Bankruptcy Act (11 U.S.C. § 649). It is a codification of equitable principles designed to prevent fiduciaries in the case from engaging in the specified transactions since they are in a position to gain inside information or to shape or influence the course of the reorganization. *Wolf v. Weinstein*, 372 U.S. 633 (1963). The statutory bar of compensation and

reimbursement is based on the principle that such transactions involve conflicts of interest. Private gain undoubtedly prompts the purchase or sale of claims or stock interests, while the fiduciary's obligation is to render loyal and disinterested service which his position of trust has imposed upon him. Subsection (b) extends to a trustee, his attorney, committees and their attorneys, or any other persons "acting in the case in a representative or fiduciary capacity." It bars compensation to any of the foregoing, who after assuming to act in such capacity has purchased or sold, directly or indirectly, claims against, or stock in the debtor. The bar is absolute. It makes no difference whether the transaction brought a gain or loss, or neither, and the court is not authorized to approve a purchase or sale, before or after the transaction. The exception is for an acquisition or transfer "otherwise" than by a voluntary purchase or sale, such as an acquisition by bequest. *See Otis & Co. v. Insurance Bldg. Corp.*, 110 F.2d 333, 335 (C.A. 1, 1940).

Subsection (c) is intended for no asset liquidation cases where minimal compensation for trustees is needed. The sum of $20 will be allowed in each case, which is double the amount provided under current law.

[*Senate Report No. 95-989, 95th Cong., 2d Sess. 40-41 (1978).*]

Section 330(a) contains the standard of compensation adopted in H.R. 8200 as passed by the House rather than the contrary standard contained in the Senate amendment. Attorneys' fees in bankruptcy cases can be quite large and should be closely examined by the court. However bankruptcy legal services are entitled to command the same competency of counsel as other cases. In that light, the policy of this section is to compensate attorneys and other professionals serving in a case

under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11. Contrary language in the Senate report accompanying S. 2266 is rejected, and *Massachusetts Mutual Life Insurance Company v. Brock*, 405 F.2d 429, 432 (5th Cir. 1968) is overruled. Notions of economy of the estate in fixing fees are outdated and have no place in bankruptcy code.

Section 330(a)(2) of the Senate amendment is deleted although the Securities and Exchange Commission retains a right to file an advisory report under section 1109.

Section 330(b) of the Senate amendment is deleted as unnecessary, as the limitations contained therein are covered by section 828(c) of H.R. 8200 as passed by the House and contained in the House amendment.

Section 330(c) of the Senate amendment providing for a trustee to receive a fee of $20 for each estate from the filing fee paid to the clerk is retained as section 330(b) of the House amendment. The section will encourage private trustees to serve in cases under title 11 and in pilot districts will place less of a burden on the U.S. trustee to serve in no-asset cases.

Section 330(b) of H.R. 8200 as passed by the House is retained by the House amendment as section 330(c).

[*124 Cong. Rec. H 11,091-2 (Sept. 28, 1978); S 17,408 (Oct. 6, 1978).*]

This section provides an additional $15 compensation for the services of a trustee in a chapter 7 case in addition to the $45 already provided for in Bankruptcy code section 330(n). To obtain the funds to pay the additional fees, the Judicial

Conference of the United States is required to prescribe additional fees payable by parties as provided in section 1914(b) of title 29; the Judicial Conference of the United States is also authorized to prescribe fees for notices of appearances filed by parties-in-interest after a bankruptcy case is filed and fees to be charged against distributions to creditors. The latter fees would be deducted, by trustees or other entities making distributions, from the monies payable to creditors, constituting user fees charged to those who participate in bankruptcy cases by receiving distributions. Since the fees are payable by the creditors from funds to be distributed to them, such deductions would not affect the application of the best interests of creditors test or other tests for confirmation in chapters 11, 12 or 13. No higher payment from the debtor would be necessary to meet these tests due to the deduction. It is the Committee's intention that the funds for this increase not be borne by the Federal Treasury or by debtors in chapter 7 or 13 cases.

[*140 Cong. Rec. H 10,767 (October 4, 1994).*]

The section also clarifies the standards for court award of professional fees in bankruptcy cases. These changes should help foster greater uniformity in the application for and processing and approval of fee applications.

[*140 Cong. Rec. H 10,769 (October 4, 1994).*]

Supreme Court, U.S.
FILED
JUN 3 2002
CLERK

No. 01-1608

In The
Supreme Court of the United States

HOULIHAN, LOKEY, HOWARD & ZUKIN, INC.,

Petitioner,

v.

THE CIRCLE K CORPORATION, DEBTOR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a bankruptcy estate professional's final fee application subject to review for reasonableness under 11 U.S.C. § 330 rather than exempt from such review under 11 U.S.C. § 328, when

a. neither the retention application nor the retention order specified that the retention was to be pursuant to section 328; and

b. neither the retention application nor the retention order specified that the fees sought were to be pre-approved and not subject to further review for reasonableness?

2. Did the Ninth Circuit Court of Appeals act properly when it applied its decision to the parties before it, rather making its ruling purely prospective?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Houlihan, Lokey, Howard & Zukin, Inc., a California corporation ("Houlihan Lokey"). Respondent is Circle K Stores Inc., a Texas corporation, f/k/a The Circle K Corporation ("Circle K"), the debtor in the underlying bankruptcy proceeding. Circle K is not a public company.

PARENT COMPANY OF CIRCLE K:

The parent company of Circle K is The Circle K Corporation, a Delaware corporation, which is wholly owned by Tosco Corporation, a Nevada corporation, a wholly owned subsidiary of Phillips Petroleum Company, a Delaware corporation. Phillips Petroleum Company is a public company.

SUBSIDIARIES AND AFFILIATES:

Circle K has the following subsidiaries:

- TMC Franchise Corporation, an Arizona corporation
- Spirit Enterprises, Inc., a Delaware corporation
- Circle K Enterprises, Inc., a Delaware corporation
- Circle K Licensing Company, Inc., a Texas corporation
- K-Cal Ventures L.L.C., an Arizona limited liability company

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OPINIONS BELOW

The December 5, 2001 opinion of the court of appeals (Pet. App. 14a-25a) is reported at 272 F.3d 1150 (9th Cir. 2001). The January 30, 2002 Order and Amended Opinion (Pet. App. 1a-13a) is reported at 279 F.3d 669 (9th Cir. 2002). The two decisions of the United States District Court for the District of Arizona (Pet. App. 43a-52a and 26a-40a, respectively) are unreported. The decision of the United States Bankruptcy Court for the District of Arizona (Pet. 53a-72a) is reported at 191 B.R. 426 (Bankr. D. Ariz. 1996).

JURISDICTION

The Ninth Circuit entered its decision on December 5, 2001. Petitioner timely filed a petition for rehearing and rehearing *en banc* was denied on January 30, 2002. The Ninth Circuit filed its Order and Amended Opinion on January 30, 2002. Petitioner filed its Petition for Writ of Certiorari on April 30, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves application of portions of the Bankruptcy Reform Act of 1978, as amended, found in Title 11 of the United States Code §§ 101, *et seq.* (the "Bankruptcy Code"). Bankruptcy Code § 1103(a) authorizes the employment of professional persons to represent or assist officially created committees in Chapter 11 proceedings.

11 U.S.C. § 327(a) provides, in relevant part, that the trustee, with the court's approval, may employ "professional persons that do not hold or represent an interest adverse to the estate, to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. § 330 authorizes the compensation and reimbursement of expenses of professionals retained in a case. It also sets forth the standards pursuant to which the amount of compensation is to be determined. 11 U.S.C. § 330(a)(1)(A) provides that *after notice and a hearing* and subject to section 328, the court may award a professional person employed under section 327 a *reasonable* compensation for actual, necessary services rendered by the professional person. (emphasis added). Section 330 also provides that the court may award compensation that is less than the amount of compensation that is requested. 11 U.S.C. § 330(a)(2).

However, if a professional is retained pursuant to section 328, an analysis under section 330 is subject to the limitations found in section 328.

Bankruptcy Code § 328(a) provides:

> (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in

light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

11 U.S.C. § 328(a).

The full text of sections 328 and 330 is set forth in Pet. App. 109a-114a.

STATEMENT OF THE CASE

At issue in this case is the clarity with which a professional must specify the nature of its retention in a bankruptcy proceeding. Section 328 of the Bankruptcy Code permits a bankruptcy court to approve in advance the fee arrangement of a professional retained by the bankruptcy estate. Where a bankruptcy court gives prior approval to a fee agreement pursuant to section 328(a), the bankruptcy court is prohibited from later evaluating the final fee application under the "reasonableness" standard of section 330. It is, instead, limited to determining whether the pre-approved fee agreement was improvident based on unforeseen developments.

Houlihan Lokey contends that it sufficiently specified at the beginning of the bankruptcy case that the bankruptcy court pre-approved its compensation pursuant to section 328 even though:

(1) the retention application prepared and filed by Houlihan Lokey stated neither that it sought retention pursuant to section 328, nor that the fees and costs sought were to be pre-approved and not subject to further review pursuant to section 330 for reasonableness. Pet. App. 73a-94a.

(2) the retention application filed by Houlihan Lokey affirmatively stated that it remained subject to subsequent bankruptcy court approval in a final fee application. Pet. App. 77a.

(3) the bankruptcy court order approving Houlihan Lokey's retention stated neither that the retention was to be pursuant to section 328 nor that the fees sought were to be pre-approved and not subject to further review for reasonableness. Pet. App. 97a-99a.

(4) the bankruptcy court order approving Houlihan Lokey's retention expressly stated that the fees set forth in the order are "subject to review by the court in a final fee application pursuant to relevant provisions of the Bankruptcy Code." Pet. App. 99a.

Upon consideration of Houlihan Lokey's fee application at the conclusion of the bankruptcy case, the bankruptcy court disagreed that Houlihan Lokey had applied for retention under section 328, concluding in a published opinion that "it is disingenuous to now assert section 328 applies and the Court can only examine whether the employment agreement was improvident." Pet. App. 71a. The court reviewed Houlihan Lokey's fees for reasonableness pursuant to section 330(a), and disallowed one-half of Houlihan Lokey's requested fees. Pet. App. 71a.

On appeal, the district court determined that Houlihan Lokey had been employed pursuant to section 328, and reversed and remanded the case to the bankruptcy court, with instructions that the bankruptcy court was to grant Houlihan Lokey's fees pursuant to section 328(a) unless it found that the terms and conditions of Houlihan Lokey's retention were "improvident in light of developments not capable of being anticipated at the time of the fixing of the terms and conditions." Pet. App. 52a.

On remand, the bankruptcy court stated that when it approved the retention of Houlihan Lokey, it intended to enter a section 330 order, under which Houlihan Lokey would submit a fee application to the bankruptcy court for a determination that the fees were reasonable, actual, and necessary. The court stated, "I don't have any difficulty in agreeing with the debtor that what my intent was in the [Houlihan Lokey] appointment order was to enter what's essentially a section 330 order, and I frankly thought I was." Resp. App. 4a. The bankruptcy court nonetheless entered an order granting Houlihan Lokey the full amount of fees and costs requested, as well as interest and attorney's fees. Resp. App. 6a-9a. Circle K appealed to the district court. The district court upheld the bankruptcy court's order, Pet. App. 26a-40a, and Circle K timely appealed to the Ninth Circuit Court of Appeals.

On appeal, the Ninth Circuit held that unless a professional's retention application unambiguously specifies that it seeks approval under section 328, it is subject to review under section 330. Pet. App. at 7a.

ARGUMENT

1. There Is No Split Among the Circuits On An Important Issue Of Federal Law.

The decision of the court of appeals is correct, and does not conflict with any decision of this Court.

Houlihan Lokey asserts that there is a split between the Fifth and Ninth Circuits regarding the treatment of retention applications that requires this Court's review. However, the Fifth Circuit case cited by Houlihan Lokey may be distinguished from the Ninth Circuit decision on

the same issue. Further, no other court of appeals has directly addressed the issue. The Ninth Circuit, however, has expressed the majority view as well as the correct rule, in that the bankruptcy courts in other circuits which have addressed the issue agree with the Ninth Circuit. Finally, having different rules regarding retention applications in different circuits will not cause any practical operational problems, as retentions are generally highly localized and court specific, and subject to local rules and practices. Accordingly, under all the circumstances, further review is not warranted or necessary.

a. No Split in Authority.

Houlihan Lokey asserts that the Ninth Circuit's opinion splits from that of the Fifth Circuit expressed in *In re National Gypsum Company*, 123 F.3d 861 (5th Cir. 1991). In *National Gypsum*, the court determined that a retention order for a financial advisor was entered pursuant to section 328, and that therefore review of the fee application was limited to whether the fee arrangement approved in the retention order was improvident. *Id.* at 863.

The *National Gypsum* case may be distinguished in several ways. First, the Fifth Circuit did not state in its decision whether or not the retention application and the retention order (a) mentioned section 328,[1] or (b) indicated

[1] The Ninth Circuit stated in its opinion that section "328 was not specified in the retention application" in the *National Gypsum* case. Pet. App. 25a. However, the Fifth Circuit opinion in *National Gypsum* does not indicate whether or not the retention application specifically mentioned section 328. *National Gypsum*, 123 F.3d at 862-4.

that the professional compensation was to be pre-approved. *Id.* In contrast, these facts were crucial to the Ninth Circuit decision. Pet. App. 11a.

Second, in *National Gypsum*, the financial advisor made *three* (3) applications for interim compensation. The financial advisor received no objection to the fee arrangement until it made its final fee application. *National Gypsum*, 123 F.3d at 862. The fact that multiple fee applications were filed without objection indicates that perhaps the retention application and order in *National Gypsum* were more clear than the application and order in the present case, where Houlihan Lokey's sole fee application drew a timely objection from Circle K.

The only similarity between this and the *National Gypsum* case is that in both cases, the court expressly retained the right to approve the professional's fees. *Id.*; Pet. App. 77a, 99a. The Fifth Circuit did not find the retention of the right to review the fees inconsistent with a section 328 application. *National Gypsum*, 123 F.3d at 863. The Ninth Circuit stated that it disagreed with the Fifth Circuit. "In this Circuit, unless a professional is unambiguously employed pursuant to § 328, its professional fees will be reviewed for reasonableness under § 330. To ensure that § 328 governs the review of a professional's fees, a professional must invoke the section explicitly in the retention application." Pet. App. 24a-25a. The Ninth Circuit's disagreement with the Fifth Circuit thus seems to be based more upon whether section 328 must be specifically invoked in a retention application, an issue the Fifth Circuit was actually *silent* upon,[2] than upon whether

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[2] See FN1, *supra*.

a reservation of the court's right to review fees for reasonableness makes a retention application/order ambiguous. Therefore, the Ninth Circuit and the Fifth Circuit do not appear to have actually disagreed upon any real issue.

b. Ninth Circuit Decision Represents Majority View.

As demonstrated above, there is no real split between the Fifth and Ninth Circuits on the issue of the specificity of retention applications. Even if there is a split, it does not reflect a major difference that must be resolved by this Court. No other court of appeals has addressed the issue directly. However, the Ninth Circuit seems to have expressed the majority view as well as the correct rule.

The only other court of appeals to consider a section 328 retention application held that a financial advisor who does not clearly set forth the terms that it wishes to have pre-approved may not avoid a subsequent review of the terms for reasonableness under section 330. *Zolfo, Cooper & Co. v. Sunbeam-Oster Company, Inc.*, 50 F.3d 253, 261-62 (3d Cir. 1995). In *Zolfo*, the accounting firm's affidavit in support of the retention application stated the specific terms and conditions of employment, but the order approving the retention merely referred to the affidavit, without setting forth the specific rates in the order itself. Judge Scirica, writing for the Third Circuit, explained " . . . the burden should rest on the applicant to ensure that the court notes explicitly the terms and conditions if the applicant expects them to be established at that early point." *Id.* at 262. While the issue addressed by the Third Circuit is different, the spirit of the decision is more similar to that of the Ninth Circuit in this case, than to

the Fifth Circuit in *National Gypsum*. Professionals who seek to be retained in a bankruptcy case bear the burden of ensuring that their retention application and order is sufficiently clear to give the court and interested parties notice of the terms of the retention.

The bankruptcy courts which have addressed the issue have sided with the Ninth Circuit. *See In re Northeast Express Reg'l Airlines, Inc.*, 235 B.R. 695, 699 (Bankr. D. Maine 1999) (court discussed *National Gypsum*, but found that language in the employment agreement at issue, "all fees and expenses shall remain subject to review and approval by this Court," effectively preserved the court's power to conduct an 11 U.S.C. section 330 review); *In re Olympic Marine Servs., Inc.*, 186 B.R. 651, 652, 654 (Bankr. E.D. Va. 1995) (order approving employment application and stating that any application for compensation would be "subject to further review of the court" did not limit review to improvidence inquiry under section 328).

There is no pressing reason for the Court to review the Ninth Circuit decision. There is no disagreement in any circuit on the major issue: that a retention application and order must unambiguously invoke section 328, or it will be subject to a subsequent section 330 review for reasonableness.

2. Application of the Ninth Circuit's Decision To The Parties Before It Does Not Warrant This Court's Review.

Houlihan Lokey claims that the Ninth Circuit's decision was an articulation of new law, which cannot be applied "retroactively" to Houlihan Lokey. To the contrary,

the Ninth Circuit merely made clear that an application and order for retention of a bankruptcy professional must be clear and unambiguous, and found that Houlihan Lokey's application and order were not.

a. The Ninth Circuit's Decision Was Not An Overruling Decision.

Houlihan Lokey characterizes the Ninth Circuit's decision as requiring "magic words," which were not previously required, in order to characterize a retention as one under section 328. This is not the case. The Ninth Circuit made clear in its decision that its concern is that a professional must unambiguously specify that it seeks approval under section 328, or it will be subject to review under section 330. Pet. App. 7a. The Ninth Circuit found that Houlihan Lokey's retention application was ambiguous not only because it did not specifically refer to section 328, but also because it provided that "all fees so paid remain subject to subsequent Bankruptcy Court approval in a final fee application to be submitted to the Court." Pet. App. 11a. The Ninth Circuit also stated that other circumstances indicated that the retention was ambiguous, namely (1) that the retention order made no reference to either section 328 or section 330, (2) the retention order explicitly stated that Houlihan Lokey's fees were subject to review by the court in a final fee application, (3) the bankruptcy court's stated belief that it had not unconditionally approved Houlihan Lokey's fees, and (4) the fact that another professional in the case did explicitly specify section 328 in its retention application, and the order approving that retention was much more clear than the Houlihan Lokey retention order. Pet. App. 11a-12a. The Ninth Circuit cited all of these facts in its ruling that the

circumstances did not indicate that section 328 approval was unambiguously sought by Houlihan Lokey in its retention application, and granted by the Bankruptcy Court in its retention order.

Houlihan Lokey argues that the Ninth Circuit has created a new bright-line test that it impermissibly applied retroactively to the parties before it. The Ninth Circuit indicated in its opinion that professionals seeking retention under section 328 should explicitly cite section 328 in their retention applications. Pet. App. 13a. However, given the Ninth Circuit's recitation of the myriad ambiguities surrounding Houlihan Lokey's retention (Pet. App. 11a-12a) there is nothing in the Ninth Circuit opinion which suggests that the opinion was based on the mere failure of Houlihan Lokey to recite section 328.

It has always been the law, in the Ninth Circuit and in other circuits, that a professional seeking retention under section 328 must do so clearly and unambiguously, so as to give other parties notice that there will be no further opportunity to review the fee arrangement for reasonableness. The "deference afforded under section 328 does not apply unless the appointment order 'expressly and unambiguously states specific terms and conditions (*e.g.*, specific hourly rate or contingency fee arrangements)' that are being approved pursuant to the first sentence of section 328." *In re Gillette Holdings, Inc.*, 143 B.R. 256, 259 (Bankr. D. Colo. 1992), quoting *In re C&P Auto Transport, Inc.*, 94 B.R. 682, 685, n. 4 (Bankr. E.D. Cal. 1988). *See also, Zolfo, Cooper & Co. v. Sunbeam-Oster Company, Inc.*, 50 F.3d 253, 261-62 (3d Cir. 1995) ("The bankruptcy court's duty to conduct an independent examination of fee applications for services rendered would be unduly restricted if employment authorization order were routinely construed

as binding the court to particular terms of employment.") (citation omitted). It was previously held within the Ninth Circuit that, where it is ambiguous whether the parties intended to limit, pursuant to section 328(a), the Bankruptcy Court's authority in awarding attorney's fees, the Bankruptcy Court is permitted to authorize a reasonable fee pursuant to 11 U.S.C. § 330. *In re Campos*, 166 B.R. 914, 917 (N.D. Cal. 1994). In *Campos*, the United States District Court held that an order approving compensation was ambiguous as to whether the terms for compensation were being pre-approved pursuant to section 328(a) where (1) the order cited no statutory authority, (2) the order authorized employment on specific terms, yet (3) the order specified that a reasonable fee was to be paid on application to the court. As a result, the District Court held that the Bankruptcy Court's review of the fee application pursuant to section 330(a) for reasonableness was not clearly erroneous. Prior case law within the Ninth Circuit is clear: a professional seeking retention under section 328(a) must unambiguously state that it is so doing. The recent Ninth Circuit opinion does not overrule or disagree with any authority within the Ninth Circuit, or indeed, any authority other than that of the Fifth Circuit in *National Gypsum*. To professionals employed by bankruptcy estates, the Ninth Circuit's opinion was nothing new.

b. Ninth Circuit Properly Applied its Decision to the Parties Before It.

The case law which Houlihan Lokey cites in support of its argument that retroactive application of the "new test" is prohibited does not address the current factual situation, where the test is being applied to the parties before

the court. This Court has either made its decisions fully retroactive (applied to the parties before the Court and all cases currently pending in the system), selectively prospective (applied to the parties before the court but not to the other cases still pending), or purely prospective (applied only to cases filed after the decision). *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 525-36 (1991). Houlihan Lokey urges that the Court rule that the decision of the Ninth Circuit not be applied to it, but rather be applied only purely prospectively to later cases.

None of the cases cited by Houlihan Lokey address whether a decision shall be applied purely prospectively. Every case relied upon by Houlihan Lokey is a case in which the court is determining whether selective prospectivity is appropriate.[3]

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[3] For example, the main case upon which Houlihan Lokey relies is *Chevron Oil v. Huson*, 404 U.S. 97 (1971). The issue in *Chevron Oil* was whether the time for bringing the action was governed by a state statute of limitations, in which case the action was time-barred, or by the admiralty law doctrine of laches, in which case it was not. While the case was pending before the district court, the Supreme Court held in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), that state law rather than admiralty law applies in such cases. The issue before the Supreme Court in *Chevron Oil* was thus whether "*Rodrigue* should . . . be applied retroactively to bar actions filed before the date of its announcement." 404 U.S. at 99. The Court held that state statutes of limitations made applicable under *Rodrigue* "should not be applied retroactively." 404 U.S. at 108 n. 10.

Chevron Oil is thus distinguishable from this case: it was not the law-changing case; *Rodrigue* was. And the rule of law announced in *Rodrigue* was applied to the litigants before the court in that case. *See Rodrigue*, 395 U.S. at 366. Thus, *Chevron Oil* was not an example of purely prospective decision-making. Rather, it was a straight-forward example of selective prospectivity.

This Court still has not resolved whether purely prospective decision-making is consistent with the constitutional role of the judiciary. The general rule is that judicial decisions are fully retroactive, applicable to all pending and future cases. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). Contrary to the cases cited by Houlihan Lokey, it is now settled that selective prospectivity is not permitted: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review, as to all events regardless of whether such events predate or postdate [the] announcement of the rule." *Id.*

In *Chevron Oil*, 404 U.S. 97, the Court recognized the possibility of purely prospective rulings in extraordinary cases, but the continuing vitality of that doctrine remains in doubt as members of the Court have questioned its compatibility with the judicial function of declaring what the law is rather than deciding what it should be. In *James B. Beam*, Justice Souter noted that purely prospective adjudication is wholly unknown and unavailable: "Retroactive application could hardly [be] denied the litigant in the law changing decision itself. A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace." 509 U.S. at 537. With respect to civil cases, Justice Souter questioned whether "pure prospectivity may be had at all," but refused to "speculate as to the bounds or propriety of pure prospectivity." *Id.* at 541, 544.

In *Harper*, this Court held that its own decisions must apply retroactively, even if they announce new rules of law. The Court explicitly rejected the technique of "selective"

prospectivity, under which a new rule would apply to the decision in which it was announced, but to no other cases involving pre-decision events. 509 U.S. at 107. But more importantly for the present case, the Court's broad language cast grave doubt on the permissibility of "pure" prospectivity, under which a new rule would not apply even to the decision in which it was announced. *Id.* ("'[T]he nature of judicial review' strips us of the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit." (citation omitted)).

c. Application of Ninth Circuit Decision Does Not Prejudice Houlihan Lokey.

In any case, the debate over the propriety of purely prospective judicial decisions can wait for another day. Even if the three-part test of *Chevron Oil* is applied, the Ninth Circuit's decision must be applied to Houlihan Lokey.

First, a "decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106 (citations omitted). Here, the Ninth Circuit did not resolve issues of first impression, and did not change the existing law.

Second, *Chevron Oil* "looked to the prior history of the rule in question, its purpose and effect, and whether retroactive operation will further or retard its operation." 404 U.S. at 107 (citation omitted). In this case, applying the Ninth Circuit's decision to the parties before it is the only way to accomplish the goal of the decision, which is to

place the burden of ensuring that the terms of a professional's retention are unambiguously disclosed on the professional, so that the parties know at the time of the retention whether the terms are being pre-approved, or whether there will be a further opportunity to object to the reasonableness of the proposed terms.

Third, *Chevron Oil* "weighed the inequity imposed by retroactive application . . . ." *Id.* Houlihan Lokey asserts that it is inequitable to subject it to the loss of the fees that it claims the Bankruptcy Court pre-approved. But what would be truly inequitable would be to permit a professional like Houlihan Lokey to sidestep initial scrutiny of its fees at the retention stage, by not clearly indicating that it was seeking pre-approval of all of its fees, and then also foreclose any later review of the fees for reasonableness. The Ninth Circuit decision ensures that all fee arrangements, whether under section 328 or section 330, will be scrutinized at some point, either at the beginning of the case when a retention application that clearly invokes section 328 and seeks pre-approval of fees is filed, or at the end of the case, when a fee application is filed and reviewed under section 330 for reasonableness. Applying the decision to Houlihan Lokey is the only way to ensure that Houlihan Lokey's fee arrangement is reviewed at all. Upon review, Houlihan Lokey will only face the risk of loss of those fees that the court deems were not reasonable or necessary to the reorganization of the debtor. Houlihan Lokey will still be entitled to any fees that the court finds are reasonable.

d. Intent of the Parties

Houlihan Lokey contends that the application of the Ninth Circuit's decision to the parties before it is contrary to the parties' intent. As evidence of the parties' intent, Houlihan Lokey cites only the January 17, 1996 order of the bankruptcy court, in which the court mused that "the parties appear to have contemplated a flat fee arrangement." Pet. 7, citing Pet. App. 67a-68a. This is evidence that the parties contemplated a flat fee, not that the parties contemplated that the flat fee would be pre-approved. In fact, in the *same order*, the bankruptcy court stated that Houlihan Lokey was "disingenuous" in later trying to characterize its retention application as one under section 328. Pet. App. 71a.

Far better evidence of the parties' intent are the words of Houlihan Lokey: In its final fee application, Houlihan Lokey clearly stated that it sought approval of its fees "pursuant to section 327 and 330 of Title 11 of the United States Bankruptcy Code." Resp. App. 11a. Elsewhere in its final fee application, Houlihan Lokey asked the bankruptcy court to find that the "compensation and reimbursement of expenses requested herein are *reasonable and necessary and commensurate with the benefits received by the estate and therefore should be approved.*" Resp. App. 12a (emphasis added). And in a pleading related to its motion for reconsideration of the bankruptcy court's order disallowing a portion of its fees, Houlihan Lokey stated that it was *not clear whether Houlihan Lokey had been retained under section 328 or 330.* Resp. App. 18a (emphasis added). Elsewhere in the same pleading, Houlihan Lokey stated:

> Houlihan Lokey's Retention Application and Retention Order *cited to no Code sections* as governing the terms of its retention. Given the lack of consistency in the applications filed in the case, *it is far from clear* under which Code section or sections Houlihan Lokey's retention (and subsequent compensation) should be reviewed.

Resp. App. 16a (emphasis added).

The Ninth Circuit held that Houlihan Lokey did not unambiguously specify that it was to be retained under section 328 rather than section 330. It is not unfair to "retroactively" apply this ruling to Houlihan Lokey. Houlihan Lokey has admitted repeatedly during the underlying proceedings that even it was not sure under what standard it had been retained. These prior statements belie Houlihan Lokey's current claim that the application of the Ninth Circuit decision would defeat Houlihan Lokey's expectations and the parties' intent. Houlihan Lokey's own admissions indicate that it had no justified expectations, and no clear intent.

CONCLUSION

Circle K respectfully submits that the petition for a writ of certiorari should be denied. There is no real conflict between the Ninth Circuit and the Fifth Circuit on an important issue that must be resolved. Further, there is no reason that the Ninth Circuit's application of its decision to the parties before it should be disturbed.

Respectfully submitted,

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Counsel for Respondent
The Circle K Corporation

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In Re.	)	
THE CIRCLE K CORPORATION	) CH. 11)	90-05052-PHX-GBN
MOTION FOR ENTRY OF ORDER APPROVING FEES AND COSTS FOR HOULIHAN, LOKEY, HOWARD & ZUKIN	)	

U.S. Bankruptcy Court
2929 N. Central Ave., 9th Floor
Phoenix, Arizona 85012

October 27, 1998
1:05 p.m.

BEFORE THE HONORABLE GEORGE B. NIELSEN, JR., Judge

APPEARANCES:

For the Debtor: Christopher H. Bayley
Steven Jerome
SNELL & WILMER
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Phoenix, AZ 85004-0001

For the U.S. Trustee: Paul A. Randolph
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Ste. 700
Phoenix, AZ 85012

For Houlihan, Lokey, Howard & Zukin:	Michael Kramer HOULIHAN, LOKEY, HOWARD & ZUKIN 31 West 52nd Street, 11th Floor New York, NY 10019
For Houlihan, Lokey, Howard & Zukin:	Thomas J. Salerno SQUIRE, SANDERS & DEMPSEY 40 N. Central Ave., Suite 2700 Phoenix, AZ 85004-4441

Proceedings recorded by electronic sound technician, Virginia Beeby; transcript produced by A/V Tronics, Inc.

[2] THE COURT: Good afternoon. Be seated.

THE CLERK: Case number 90-5052, *The Circle K Corporation*, and we do have a telephonic appearance.

THE COURT: This is Judge Nielsen. I'll take appearance on our phone line.

MR. KRAMER: Michael Kramer from Houlihan, Lokey.

THE COURT: all right, Mr. Kramer. And I'll take appearances now in the courtroom.

MR. SALERNO: Good afternoon, Your Honor. Thomas Salerno, Squire, Sanders & Dempsey on behalf of Houlihan, Lokey.

MR. RANDOLPH: Good afternoon. Paul Randolph with the U.S. Trustee. And, Your Honor, I'd like the Court's permission if necessary to excuse myself at about

25 or 28 after. I have a 1:30 hearing – if that's acceptable to the Court.

THE COURT: all right. Mr. Randolph, when you lose interest, you can just depart.

MR. RANDOLPH: No, no. We're very interested. Your Honor. Just short staffed.

THE COURT: Just for the next 25 minutes you will be.

All right. We're grateful for however much time we can have.

MR. BAYLEY: Afternoon, Your Honor. Christopher [3] Bayley here on behalf of Circle K. I also have with me here today from Circle K Catherine Krecke, in-house counsel, as well as Mr. Steve Jerome from my office as well.

THE COURT: All right. Noted.

Ladies and gentlemen, what I've reviewed in preparation for this hearing, I've gone back and looked at the prior pleadings that were filed in connection with this matter including the order of the United States District Court. I've reviewed the original motion that was filed here to set a hearing on this particular matter, the original response filed first of all by the U.S. Trustee, a reservation of rights, and then an opposition from the debtor. I've reviewed what the movant terms a first supplement, and a second supplement, and then a response that was filed by the debtor, and a reply submitted by the movant. And then, finally, the last think I've seen is the U.S. Trustee's statement of clarification regarding reservation of rights.

So if I've seen everything, I'm prepared to rule, but I'll first listen with interest to the comments of counsel.

To make any presentations meaningful, let me tell you what my initial inclination here is. And my initial inclination is that although neither I nor Mr. Bayley much like the reversal that was effectuated here by the district [4] court, that reversal and the remand is a fact. And I must operate within the scope of that remand. I don't have any difficulty in agreeing with the debtor that what my intent was in the appointment order was to enter what's essentially a § 330 order, and I frankly thought I was. But the district court feels that I was mistaken and that isn't what I intended to do. And with that, I guess we'll have to differ, but it isn't just simply a difference of opinion.

The superior court has ruled and established a relatively narrow area for us to operate in – on the remand. And I believe that area is indeed simply to determine whether there are circumstances existing which I didn't appreciate when I initially signed the appointment order.

That standard is more awkward in this case than perhaps normally, because I really – I didn't think I was entering a 328 order, but – so that makes the analysis perhaps even more tortured here. But the circumstances are governed by the district court. It's just not at all clear to me at this point that there are – that I can find happenings here which could not have been foreseen at the time I signed that original appointment order.

So I'm inclined to think what I should do is grant the motion and enter this particular order on remand, even though neither Mr. Bayley or I like it much.

* * *

[45] MR. BAYLEY: None, Your Honor.

THE COURT: We're adjourned. We're going to stay in session while these parties withdraw. We'll call our 1:45 calendar in a moment or two. I'm going to leave the line now.

(Proceedings Concluded)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

November 5, 1998

/s/ [Illegible]
A/V Tronics
2715 N. Third Street,
Ste. 207
Phoenix, Arizona 85004

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: THE CIRCLE K CORPORATION, et al., Debtor.	In Proceedings Under Chapter 11 Case Nos. 90-5052-PHX-GBN To 90-5075-PHX-GBN
THE CIRCLE K CORPORATION, Movant, vs. HOULIHAN, LOKEY, HOWARD & ZUKIN, INC., Respondent.	**ORDER AUTHORIZING AND ALLOWING FEES AND COSTS** (Filed Jan. 27, 1999)

This matter came before the Court pursuant to the "*Motion For Entry Of Order Approving Fees And Costs For Houlihan, Lokey, Howard & Zukin, Inc.*" filed on April 24, 1998 as supplemented pursuant to supplements filed on August 20, 1998, September 11, 1998, October 21, 1998 and December 18, 1998 (collectively the "Motion"). The Motion dealt with the request for allowance of the professional fees incurred by HOULIHAN, LOKEY, HOWARD & ZUKIN, INC. ("Houlihan Lokey") as a result of services rendered to, *inter alia*, the Official Committee of Debentureholders in the above-captioned Chapter 11 proceeding. The Court held hearings on the Houlihan Lokey fee request as a result of the District Court's remand instructions pursuant to the District Court's "*Order*" dated April 10, 1998 (the "District Court Order"). Oral argument was held with respect to the Motion and opposition thereto filed by CIRCLE K STORES, INC. (formerly known as The

Circle K Corporation, and hereafter referred to as "Circle K") on October 27, 1998 and November 25, 1998. This Court put its findings of fact and conclusions of law on the record pursuant to Bankruptcy Rule 7052 at the hearing held on November 25, 1998, and instructed Houlihan Lokey to provide certain supplemental information with respect to its request for reimbursement of its attorneys' fees and costs incurred with respect to the prosecution of its fee application, which supplement was timely filed on December 18, 1998. In light of the foregoing, and the Court having considered the Motion (as supplemented), the responses and objections thereto filed by Circle K, the District Court Order and the record in this case, and good cause appearing therefor,

IT IS HEREBY ORDERED, as follows:

1. The Motion and relief requested therein constitutes a core proceeding within which this Court may enter final and dispositive orders pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A), and 11 U.S.C. §§ 328 and 330.

2. The requested fees and costs incurred by Houlihan Lokey in the amount of $3,507,699.35 shall be, and hereby are, authorized and allowed. Of that amount, $327,306.04 was a "holdback" that Houlihan Lokey has not been paid (the "Holdback Amount").

3. In addition to the foregoing, Houlihan Lokey shall be, and hereby is, awarded interest on the Holdback Amount at the rate of 5.16% pursuant to and in accordance with 28 U.S.C. § 1961 from and after January 17, 1996. That amount through December 31, 1998 is $48,442.33. Interest will continue to accrue on the Holdback Amount at the per diem rate of $45.40 per day until paid in full.

4. In addition to the foregoing, Houlihan Lokey shall be, and hereby is, awarded reimbursement of expenses associated with obtaining the letter of credit in lieu of a supersedious bond with respect to the United States District Court in the amount of $39,660.88 (the "Letter Of Credit Expenses").

5. In addition to the foregoing, Houlihan Lokey shall be, and hereby is, awarded the amount of $196,044.08 as and for reimbursement of the legal fees and costs incurred with respect to prosecuting its fee application (the "Attorneys' Fees and Costs"). [A memorandum will subsequently be issued by the court explaining this ruling.]

6. In addition to the foregoing, Houlihan Lokey shall be, and hereby is awarded interest at the rate of 5.341% pursuant to and in accordance with 28 U.S.C. § 1961 with respect to the Letter Of Credit Expenses and the Attorneys' Fees And Costs from the date of entry of this Order until paid in full (this interest, along with the interest referred to in paragraph 3, above, collectively referred to as the "Interest").

7. Circle K is hereby ordered and directed to pay forthwith to Houlihan Lokey the Holdback Amount, Attorneys' Fees And Costs, Letter Of Credit Expenses, and accrued Interest as provided herein[, provided there is no prejudice to claims of equal or higher priority. Applicant will serve this Order on debtor & file a service certificate.]

DATED: January 27, 19989.

/s/ George B. Nielsen
HON.
GEORGE B. NIELSEN, JR.
CHIEF JUDGE
UNITED STATES
BANKRUPTCY COURT

Mr. Irwin N. Gold
Mr. Michael A. Kramer
Mr. Andrew B. Miller
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UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

IN RE:	) Chapter 11
The Circle K. Corporation, Circle K CONVENIENCE STORES, INC., Circle K. Management Company, LAR-LIN, INC., FIRST CIRCLE PROPERTIES, INC., UtoteM, Inc., UtoteM MARKETS OF ARIZONA, INC., U Totem of Alabama, Inc., U-TOTE'M OF COLORADO, INC., U-TOTE'M OF MIAMI, INC., TIC TOC SYSTEMS, INC., MONTERRE PROPERTIES, INC., SHOP & GO, INC., CIRCLE K GENERAL, INC., CIRCLE K HAWAII, INC., COMBINED AVIATION CO., Charter Marketing Company, Charter Marketing Company (Connecticut), MR. B'S OIL CO., INC.,	) Case Nos. 90-5052-PHX-GBN to 90-5075-PHX-GBN) FINAL FEE APPLICATION OF HOULIHAN, LOKEY, HOWARD & ZUKIN, INC. AS FINANCIAL ADVISOR TO THE OFFICIAL COMMITTEE OF DEBENTURE HOLDERS OF THE CIRCLE K CORPORATION FOR COMPENSATION AND REIMBURSEMENT OF SERVICES RENDERED AND EXPENSES INCURRED FOR THE PERIOD JULY 1990 TO APRIL 1992) (Filed Oct. 8, 1993)

MR. B'S FOOD MART, INC., NPI Corporation, OLD COLONY PETROLEUM COMPANY, INC., New England Petroleum Distributors, Inc., and 44th Street & Camelback Limited Partnership.

DEBTORS.

TO THE HONORABLE GEORGE B. NIELSEN, JR., UNITED STATES BANKRUPTCY JUDGE, THE UNITED STATES TRUSTEE, DEBTOR IN POSSESSION, ALL PARTIES IN INTEREST AND COUNSEL:

Preliminary Statement

Houlihan, Lokey, Howard & Zukin, Inc. ("Houlihan Lokey"), financial advisors to the Official debenture Holders' Committee (the "Committee") of the Circle K Corporation ("Circle K" or the "Company") the abovementioned debtor, pursuant to Sections 327 and 330 of Title 11 of the United States Bankruptcy Code (the "Code") and Rule 2016 of the Bankruptcy Rules, for approval of its final fee application (the "Final Fee Application") for compensation and reimbursement of services rendered and expenses incurred for the period July 1990 through and including April 1993 (the "Application Period"), respectfully represents as follows:

1. **Background**

On May 15, 1990, the Circle K Corporation and its principal subsidiaries (collectively, "Circle K" or the

"Company") filed for protection under Chapter 11 of the United States Bankruptcy Code (the "Code") in the District of Arizona. On March 13, 1992, the Company filed with the Court, a consolidated plan of reorganization (the "Plan") and a proposed disclosure statement relating to the Plan (the "Disclosure Statement"). The Plan contemplates the sale of the Company to a third party purchaser, CK Acquisition Corp. (the "Purchaser"), pursuant to Stock Purchases Agreement dated March 13, 1992, as amended and restated as of June 10, 1992, and as further amended on August 6, 1992 (the "Purchase Agreement"). In August of 1992 this Court terminated the Debtors exclusivity period, thus allowing the Committee to file its own Plan of Reorganization. This led to one of the most intense periods of this case, the Confirmation Hearings. The hearings commenced on April 7, 1993 and continued for 10 days through April 20, 1993.

* * *

Houlihan Lokey has rendered substantial services resulting in a benefit to the Debtor's estate during the period covered by this Final Fee Application. Houlihan Lokey respectfully submits that the compensation and reimbursement of expenses requested hearing are reasonable and necessary and commensurate with the benefits received by the estate and therefore should be approved pursuant to the terms of Houlihan Lokey's July 16, 1990 Court approved retention agreement.

WHEREFORE, Houlihan Lokey respectfully requests this Court to enter an order approving: Compensation for professional services rendered during the Application

Period in the amount of $3,300,000 and $207, 699.35 for reimbursement of costs and expenses incurred during the Application Period.

Houlihan, Lokey Howard & Zukin, Inc.

By: /s/ Michael A. Kramer
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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: THE CIRCLE K CORPORATION, et al., Debtor.	In Proceedings Under Chapter 11 Case Nos. 90-5052-PHX-GBN To 90-5075-PHX-GBN Contested Matter
THE CIRCLE K CORPORATION, Movant, vs. HOULIHAN, LOKEY, HOWARD & ZUKIN, INC., Respondent.	**REPLY OF HOULIHAN, LOKEY, HOWARD & ZUKIN, INC. TO CIRCLE K'S RESPONSE IN OPPOSITION TO HOULIHAN, LOKEY, HOWARD & ZUKIN, INC.'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION OF ORDER FILED JANUARY 17, 1996 PURSUANT TO RULE 59(e) FED. R. CIV. P.** **Date of Hearing: April 2, 1996** **Time of Hearing: 2:00 p.m.** **Hearing Room: 4**

HOULIHAN, LOKEY, HOWARD & ZUKIN, INC. ("Houlihan Lokey"), by and through its duly authorized, undersigned attorneys, hereby respectfully submits its Reply to Circle K Corporation's ("Circle K") "*Response in Opposition to Houlihan, Lokey, Howard & Zukin, Inc.'s Motion for Reconsideration and/or Clarification of Order Filed January 17, 1996. Pursuant to Rule 59(e) Fed. R. Civ. P.,*" filed on March 6, 1996 (the "Response"). This Reply is more fully supported by the following Memorandum of Points and Authorities.

DATED THIS 21 day of March, 1996

SQUIRE, SANDERS
& DEMPSEY
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/s/ Kathleen T. Tobin
Craig D. Hansen
Thomas J. Salerno
Kathleen T. Tobin

Attorneys for
Houlihan Lokey

MEMORANDUM OF POINTS AND AUTHORITIES

On January 17, 1996, this Court entered an Order (the "January Order"), denying one-half of Houlihan Lokey's "fees". *In re Circle K Corp.*, 191 B.R. 426 (Bankr. D. Ariz. 1996). Within the statutory 10-day period, Houlihan Lokey filed on January 29, 1996, a "*Motion for Reconsideration and/or Clarification of the January Order*" (the "Motion for Reconsideration"). On the same

day, the Court entered a "*Final Order Granting in Part, and Denying in Part, the Amended Final Fee Application of Houlihan Lokey*" (the "Final Order").

The Motion for Reconsideration requests that the Court clarify and/or reconsider its ruling as to the following issues:

> 1. The use of the term "fees" in the January Order was ambiguous. It is not clear whether the Court was referring only to compensation or to both compensation and expense reimbursement;
>
> * * *

Application"), sought to retain Salomon under Section 328 and Section 1103 of the Code. However, the Salomon Retention Order is silent on the issue. The "*Order Authorizing Circle K's Employment of Merrill Lynch Capital Markets ("Merrill Lynch") as Financial Advisor to Circle K*," dated October 15, 1990, authorized Circle K to retain Merrill Lynch pursuant to Section 327 and Section 328. However, as stated above, Houlihan Lokey's Retention Application and Retention Order cited to no Code sections as governing the terms of its retention. Given the lack of consistency in the applications filed in the case, it is far from clear under which Code section or sections Houlihan Lokey's retention (and subsequent compensation) should be reviewed. The confusion was certainly not unique to this case and reflects the lack of consensus as to how to treat investment bankers in bankruptcy cases at the time. *See infra*, pages 8-13.

Not only did the retention applications and orders provide little, if any, guidance as to the standards to be

applied to the investment bankers in the case, the orders entered by the Court implementing reporting procedures by the professionals were not instructive as to investment bankers.[6] All of the investment bankers were specifically *excluded* from such orders.[7] The Compensation Order does state that investment bankers "will be governed by a separate order"; yet

* * *

to note what the Trustee Letter is and is not. It was not an agreement that was submitted for Court approval, but rather was specifically proposed as a vehicle to allow the *Trustee's Office* to monitor Houlihan Lokey's fees. Interestingly, the Trustee has *never objected* to Houlihan Lokey's fees or costs in this case, and has taken no position with respect to the Original Application or the Amended Final Application of Houlihan Lokey. For the Court to use the Trustee Letter to impose a "meticulously accurate" time keeping requirement on Houlihan Lokey when the Trustee's Office itself has taken no such position is unfair and arbitrary.

---

[6] On June 18, 1991, the Court entered and "*Order Approving Compensation and Reimbursement Procedures for Chapter 11 Professionals.*" On December 18, 1991, the Court amended such procedures in the "*Amended Order Approving Compensation Procedure for Chapter 11 Professionals*" (the "Compensation Order").

[7] For example, the Compensation Order which clearly states that the procedures outlined therein do *not* apply to investment bankers, imposed detailed guidelines for professionals seeking interim compensation such as the submission of monthly statements containing billing rates, "detailed" descriptions of services rendered, itemized lists of expenses and brief progress reports. None of these procedures were applicable to investment bankers. *See* Compensation Order, at pages 3-4.

The Court in the January Order holds that Section 330 of the Code governs the review of Houlihan Lokey's request for fees and costs. January Order, at pages 16-17. If the application of Section 330 of the Code is based upon the reference to Sections 327 and 330 in Houlihan Lokey's Original Application, it should not be dispositive given that reference appears in a standard introductory paragraph in a pleading filed without the assistance of counsel. Moreover, to the extent the Court believes the terms of the Trustee Letter implicitly imposed on Houlihan Lokey the requirements of Section 330 and Bankruptcy Rule 2016, Houlihan Lokey submits that those relevant Code provisions do not require investment bankers to maintain "meticulously accurate" time records.

Houlihan Lokey submits that it is unclear whether Houlihan Lokey's initial retention was pursuant to Section 1103,[17] 327 or 328. As discussed above, there was variation among the terms of the orders retaining the various investment bankers in this case and Houlihan Lokey's Retention Application and Retention Order are silent on the issue. Consequently, it is unclear to what extent an analysis under Section 330 is required. Section 330 authorizes the compensation and reimbursement of

---

[17] Under Section 1103, committee appointed by the Court has the power to hire "one or more attorneys, accountants, *or other agents*, to represent or perform services" for the Committee. 11 U.S.C. § 1103 (emphasis supplied). Investment bankers have been retained by committees as "other agents". *See* Salomon Retention Application, at page 2, 5 *Collier on Bankruptcy* ¶ 1103.01[6], at 1103-7 (15th ed. 1995); ABI Report, at page 70. A committee, pursuant to Section 328(a), may employ a professional person under Section 1103 on any "reasonable terms and conditions of employment". 11 U.S.C. § 328(a).

expenses of professionals retained in a case. 11 U.S.C. § 330. It also sets forth the standards pursuant to which the amount of compensation is to be determined. *Id.* However, if a professional is retained pursuant to Section 328, an analysis under Section 330 of the Code is subject to the limitations found in Section 328.

B. The Standard Of Reporting Under Section 328

Section 328 of the Code authorizes the retention of a professional under Sections 327 or 1103 "on any reasonable terms and conditions . . . including on a retainer, on an hourly basis, or on a contingent fee basis". 11 U.S.C. § 328. With the courts approval, a debtor or committee may hire a professional person on any reasonable terms and conditions, including on a retainer or flat-fee arrangement. 11 U.S.C. § 328. However, under Section 328, the court is restricted as to when it may modify such terms. As stated by the Ninth Circuit Court of Appeals in *In re Reimers*, 972 F.2d 1127 (9th Cir. 1992):

> Under Section 328, where the bankruptcy court has previously approved the terms for compensation of a professional, when the professional ultimately applies for payment, the court cannot alter those terms unless it finds the original terms, '*to have been improvident in light of developments not capable of being anticipated at the time of the fixing* of such terms and conditions.'

Reimers, 972 F.2d at 1128 (emphasis added). Courts have regularly allowed, pursuant to Section 328, the retention of investment bankers on terms providing for definitive fee arrangements.

* * *

The U.S. Constitution requires that parties receive notice and an opportunity to be heard before being deprived of a substantive right. *Kirk v. INS*, 927 F.2d 1106, 1107 (9th Cir. 1991); *In re Levoy*, 182 B.R. 827, 833 (BAP 9th Cir. 1995) ("It is fundamental that due process of law requires notice reasonably calculated under all the particular circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection."). Houlihan Lokey should have been given notice of, and an opportunity to address, the Court's intent to apply a new "meticulously accurate" standard of reporting. The fact that Houlihan Lokey was given neither resulted in a violation of Houlihan Lokey's right to procedural due process.

IV. CONCLUSION.

Houlihan Lokey submits that the Court should reconsider and/or clarify the January Order denying one-half of Houlihan Lokey's fees and costs for the following reasons.

1. The Court did not clarify whether the imposition of the "meticulously accurate time records" standard related to services rendered and expenses incurred by Houlihan Lokey during the:

(i) Initial Retention Period (*i.e.*, July, 1990 to December, 1991);

(ii) the Second Retention Period (*i.e.*, January, 1991 to April, 1993); or

(iii) neither, because the Court did not draw a distinction between the two.

2. The Court erred in applying the "meticulously accurate time records" standards to the Initial Retention Period and the Second Retention Period because:

(i) the case law dealing with compensation of investment bankers as it existed at the time of Houlihan Lokey's retention and as it exists today does not impose such a stringent standard;

(ii) the "meticulously accurate" standard was not imposed under the terms of the Retention Application or Retention Order;

(iii) the "meticulously accurate" standard was not imposed in this case on Houlihan Lokey or any other investment banker under the terms of the Trustee Letter or any other order of the Court; and

(iv) the application of the "meticulously accurate" standard violates due process.

3. The Court failed to consider the November Submission in ruling on Houlihan Lokey's fee application.

4. In light of all of its filings in connection with its request for compensation and expense reimbursement, Houlihan Lokey has substantially complied with the applicable standards and is entitled to an award of the compensation and expense reimbursement requested.

Therefore, Houlihan Lokey respectfully requests: (i) that the January Order be vacated; (ii) that the Court enter an order awarding Houlihan Lokey the full amount of the fees and costs requested; and (iii) for such other and further relief as this Court deems just and proper under the circumstances.

DATED THIS 21 day of March, 1996.

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/s/ Kathleen T. Tobin
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Supreme Court, U.S.
FILED
JUN 17 2002
CLERK

No. 01-1608

In the Supreme Court of the United States

HOULIHAN, LOKEY, HOWARD & ZUKIN, INC.,
Petitioner,

v.

THE CIRCLE K CORPORATION, DEBTOR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Houlihan, Lokey, Howard & Zukin, Inc. incorporates the Corporate Disclosure Statement from its Petition For Writ Of Certiorari.

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REASONS FOR GRANTING THE PETITION

1. Review Is Necessary In Order To Resolve The Split Among The Circuits On An Important Issue Of Federal Law

There is an express split between the Ninth Circuit and the Fifth Circuit on a very important issue of federal law. The Ninth Circuit in the present case held that, for § 328 to govern a professional's fees, the retention application must invoke the section explicitly, and must specify § 328. Pet. App. 7a, 12a-13a. *Donaldson Lufkin & Jenrette Sec. Corp. v. National Gypsum,* 123 F.3d 861 (5th Cir. 1997), on very similar facts, held that the retention was under § 328 because the bankruptcy court there, as here, had pre-approved a flat monthly fee. The Fifth Circuit did not require that § 328 be specified in the application since the initial approval of the terms of engagement made it a § 328 retention. The Ninth Circuit below, reaching the opposite result, recognized this as a conflict and declined to follow the Fifth Circuit's view. Pet. App. 12a. Thus, two circuits have adopted different standards on this issue of federal bankruptcy law.

Respondent asserts that the *National Gypsum* facts are distinguishable and that *National Gypsum* and the decision below are not in conflict on the salient point. On the contrary, the material facts are identical; the two circuits simply applied different tests and came to opposite conclusions. Although not contending that the Ninth Circuit was factually wrong in its reading of *National Gypsum*, or that § 328 was in fact cited in the retention application there, Respondent nonetheless quibbles about whether the Fifth Circuit opinion (as opposed to the record there) contained the

fact that the application did not specify § 328.[1] Opposition at 6-7.

Respondent then recognizes that the Ninth Circuit disagrees with the Fifth Circuit regarding whether the retention application must reference § 328. Opposition at 7-8. Respondent's contention that there is no disagreement on "any real issue" (Opposition at 8) misses the point. The requirement to use the "magic words" or specify § 328 in the application *is* the real point of disagreement.[2]

Respondent claims that the new Ninth Circuit approach is the "majority view," and that it is not in conflict with any other law. Opposition at 8-9. In fact, however, no other circuit court has ruled on this issue.[3] The Third Circuit,

[1] Respondent's claim that the Fifth Circuit did not address whether compensation was to be preapproved (Opposition at 6-7) is wrong. *See National Gypsum*, 123 F.3d at 862-63. Respondent also incorrectly asserts that three applications for interim compensation based on its flat fee, to which no objections were raised, distinguishes *National Gypsum*. Opposition at 7. Similar facts exist in this case, where thirty-three (33) monthly payments of the flat fee amount were made by Respondent without any objection.

[2] Respondent later tacitly acknowledges the division: "The recent Ninth Circuit opinion does not overrule or disagree with any authority within the Ninth Circuit, or indeed, any authority other than that of the Fifth Circuit in *National Gypsum*." Opposition at 12 (emphasis added).

[3] The district court recognized that (prior to the Ninth Circuit decision) there was no circuit court authority requiring that a professional specifically reference § 328 in its initial retention application for that section to apply. Pet. App. 50a-51a. The district court found the retention to be very clear: "It is unclear how much more express and unambiguous the court's order could

in *Zolfo, Cooper & Company v. Sunbeam-Oster Company, Inc.*, 50 F.3d 253 (3rd Cir. 1995), did not address this issue, as Respondent concedes. Opposition at 8-9.[4] There, the only issue on appeal was whether so-called "national" hourly rates listed in a retention application (the retention was on the basis of hourly rates and not a flat rate) limited the bankruptcy court's ability to review the ultimate fees for reasonableness under § 330. *Zolfo, Cooper,* 50 F.3d at 256-257. The Third Circuit held that the bankruptcy court did not err in applying rates which would effectively be lower than "national" rates.

2. The New Test Should Not Be Applied Retroactively.

Respondent denies that the Ninth Circuit created a new "bright-line" test, and claims that "it has always been the law, in the Ninth Circuit and in other circuits, that a professional seeking retention under Section 328 must do so clearly and unambiguously, so as to give other parties notice there will be no further opportunity to review the fee arrangement for reasonableness." Opposition at 11. The decision below holds that the *only* way to satisfy § 328 is to reference that section in the application. Not only is that not the law in other circuits, but prior to this decision it was not the law in the Ninth Circuit. Two prior Ninth Circuit opinions, and one Ninth Circuit Bankruptcy Appellate opinion, did not require specific reference to § 328 in order for that section to apply.

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have been in this case. The bankruptcy judge expressly approved paying Houlihan Lokey $100,000 a month." Pet. App. at 51a.

[4] The Third Circuit's mention of § 328 related to the argument that when a retention application contains a listing of hourly rates, the bankruptcy court's approval of the retention is not advance approval of the hourly rates. *Zolfo, Cooper*, 50 F.3d at 261.

In re Confections By Sandra, Inc., 83 B.R. 729 (9th Cir. B.A.P. 1987), held that where an order authorized the employment of a professional "on the terms and conditions set forth in the application" (which provided for set hourly rates and a set percentage of any recovery received in litigation), the bankruptcy court was limited in its subsequent fee review to the provisions of § 328. *Confections By Sandra*, 83 B.R. at 730-731. There was no requirement that the retention application or order cite to § 328.

Five years later the Ninth Circuit affirmed the rationale of *Confections By Sandra* in *In re Reimers*, 972 F.2d 1127, 1128 (9th Cir. 1992). In *Reimers*, the Ninth Circuit again did not require that a retention application reference § 328 in order for the professional to be entitled to § 328 review. *Reimers*, 972 F.2d at 1128.

Finally, in *In re B.U.M. International, Inc.*, 229 F.3d 824 (9th Cir. 2000), the Ninth Circuit again did not require that a retention application cite § 328 in order for that section to apply. There the court, finding that § 328 did not apply, relied upon the transcript of a pre-retention hearing wherein the bankruptcy judge specifically said that straight reasonableness standards would apply, with possible disgorgement at the end of the case, to which the parties at that hearing agreed. *B.U.M. International,* 229 F.3d at 826. *B.U.M. International* (unlike the case *sub judice*) was not based on the absence of specific reference to either § 328 or § 330. *B.U.M. International*, 229 F.3d at 829.[5]

[5] The Ninth Circuit stated:

> Neither § 328 nor § 330 were specifically referred to when [the financial advisor] submitted its application for employment or when the bankruptcy court ruled on the application. In the

Rather than create a new legal standard or split from the Fifth Circuit, *B.U.M. International* distinguished *National Gypsum* factually, in that the U.S. Trustee and the Unsecured Creditors Committee in *B.U.M. International* objected to the financial advisor's fee arrangements, and the bankruptcy court determined prior to services being rendered that the court would conduct a review based upon "reasonableness and benefit to the estate." *B.U.M. International*, 229 F.3d at 830. In addition, the Ninth Circuit suggested the better future course for bankruptcy courts:

> Although in this case the record clearly indicates that the employment agreement was *not* unconditionally approved under § 328, for future reference, we point out that the better practice would be for a bankruptcy court to accept or reject a proposed employment agreement, not to conditionally accept it

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> order approving the employment, the bankruptcy court specifically included the condition that "all fees and costs of [the financial advisor] are subject to Court approval." We conclude on this record that while the bankruptcy court may have *conditionally* approved [the financial advisor's] employment, it did not convey its complete approval under § 328. To the contrary, it specifically reserved the right to approve the fees. Even if the bankruptcy judge thought that such a reservation was unnecessary to keep the door open for court approval of the fees and costs, he nevertheless specifically and in writing put all interested parties on notice that all of [the financial advisor's] fees were subject to court approval down the road.

B.U.M. International, 229 F.3d at 829 (emphasis in original).

> subject to later review. That way, professionals would know exactly where they stood before undertaking the engagement.

B.U.M. International, 229 F.3d at 830. Unfortunately, the events giving rise to the present case occurred in 1990, and the "future reference" was unavailing. The same reasons that prompted the court in *B.U.M. International* to provide guidance for future reference suggest that the new bright line rule of law announced in this case should not be applied to events more than a decade earlier.

Respondent's assertion that "there is nothing in the Ninth Circuit opinion which suggests that the opinion was based on the mere failure of Houlihan Lokey to recite section 328" (Opposition at 11) is simply wrong. The opinion below stated unambiguously:

> In this Circuit, unless a professional is unambiguously employed pursuant to § 328, its professional fees will be reviewed for reasonableness under § 330. ***To ensure that § 328 governs the review of a professional's fees, a professional must invoke the section explicitly in the retention application.... In this case, Houlihan Lokey failed unambiguously to invoke § 328 in its Retention Application, and the bankruptcy court's Retention Order did not mention § 328 or otherwise make clear that § 328 applied. Therefore, § 330 review was appropriate.***

Pet. App. at 12a-13a (emphasis added).

This case deals with a newly articulated legal standard

in the Ninth Circuit that not only is inconsistent with the test in the Fifth Circuit, but which also declines to follow the Ninth Circuit's prior approach.

Respondent also incorrectly describes the law of prospective application. Opposition at 13-15. Relying upon *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), and *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), Respondent suggests that pure prospectivity is not an option. Respondent states: "In *James B. Beam,* Justice Souter noted that purely prospective adjudication is wholly unknown and unavailable: . . . ." Opposition at 14. This statement is incorrect. Speaking for the Court in a plurality decision, Justice Souter noted that the purely prospective method has been applied by this Court, albeit infrequently. Justice Souter cited *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), *Buckley v. Valeo*, 424 U.S. 1 (1976), and other cases to this effect. *Beam*, 501 U.S. at 536. Additionally, the quotation upon which Respondent relies for its claim that truly prospective adjudication is "wholly unknown and unavailable" actually relates only to selective prospectivity in the criminal context. Indeed, the Court in *Beam* (a) expressly limited its holding to selective prospectivity, stating that the decision did not "limit the possible applications of the Chevron Oil analysis" (501 U.S. at 543), (b) noted that the grounds for the decision were narrow (*id.* at 544), and (c) expressly declined to "speculate as to the bounds or propriety of pure prospectivity" (*id.*).

Likewise, in *Harper* the Court dealt only with the type of selective prospectivity which had been rejected in *Beam*. As Justice O'Connor noted in dissent in *Harper*, "the question of pure prospectivity is not implicated here." 509 U.S. at 116. Justice O'Connor further stated that "no decision of this

Court forecloses the possibility of pure prospectivity . . ." (*id.* at 115) and the dissent cited to cases which "repeatedly have announced rules of purely prospective effect." *Id. Griffith v. Kentucky*, 479 U.S. 314, 322 (1987), the source of the "quintessentially 'legislat[ive]' prerogative" language quoted on page 15 of the Opposition and at *Harper,* 509 U.S. at 95, dealt with limitations on selective retroactivity in the criminal context and has no application here. *Harper* holds merely that when the Court has applied a case retroactively to the parties before it, then the same rule of law must be applied to all other cases on direct review, even if the Court does not expressly consider retroactivity or prospective application of the decision.

Neither *Beam* nor *Harper* overruled *Chevron*. Thus, subsequent to *Beam* and *Harper*, lower courts have applied *Chevron*. In *Holt v. Shalala*, 35 F.3d 376 (9th Cir. 1994), for example, the Ninth Circuit applied the traditional analysis and determined that the new rule should be applied only prospectively. *Id.* at 380-81. Likewise, in *George v. Camacho*, 119 F.3d 1393, 1399 (9th Cir. 1997), the *Chevron* test was applied to determine whether a new rule of law should be applied prospectively to the parties before the Court. *Camacho* found that if the deciding court applied the rule merely prospectively, it should likewise be applied prospectively to all other cases pending on direct review and presenting the same issue. *Id.* at 1403. *Chevron* has not been overruled, remains good law, and sets forth the standard for deciding cases of pure prospectivity.

CONCLUSION

Petitioner submits that the standard to be applied in determining whether professional fees in bankruptcy matters are governed by § 328 or by § 330 should be the same across

the nation, and that the petition here should be granted in order to establish the proper standard. The new bright line test should not be applied to Petitioner and its 1990 retention.

RESPECTFULLY SUBMITTED,

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June 14, 2002